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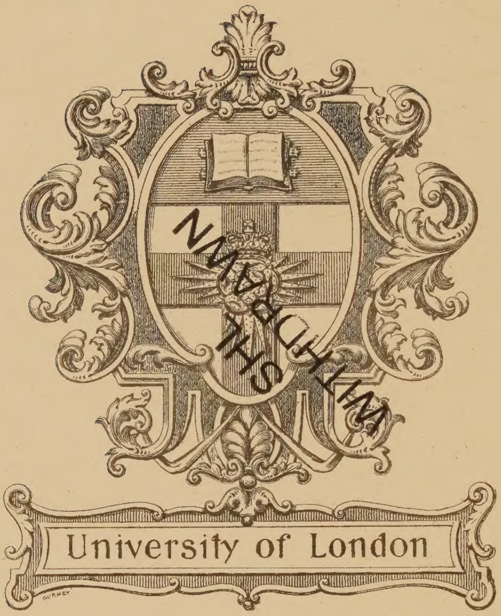
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RESUMPTION OF THE PUBLICATION OF THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

THE present volume marks the resumption of the publication of the *British Year Book of International Law* which has been suspended since 1939. Soon after the outbreak of the war Great Britain became a theatre of war in a material sense of the term. The ranks of contributors were depleted by absence on various forms of national service. The shortage of paper and the difficulties of printing also influenced the decision to suspend publication of the *Year Book*. While none of these factors have disappeared, the Editorial Committee have now come to the conclusion that the time has arrived to resume publication of the *British Year Book of International Law*. They are indebted to Sir Humphrey Milford, Oxford University Press, for his part in making that decision practicable.

Sir Cecil Hurst has been compelled, owing to urgent and important calls upon his time, to relinquish the editorship of the *Year Book*. However, as Chairman of the Editorial Committee, he has been able to give to the Committee the benefit of his great experience as Editor and otherwise.

1944. H. LAUTERPACHT.

CONTENTS

COMPARATIVE LAW AND THE LAW OF NATIONS . . . 1
By PROFESSOR H. C. GUTTERIDGE

THE LAW GOVERNING STATE CONTRACTS 11
By Dr. F. A. MANN

CONSULAR IMMUNITIES 34
By Mr. W. E. BECKETT

VITAL INTERESTS AND THE LAW 51
By PROFESSOR J. L. BRIERLY

THE LAW OF NATIONS AND THE PUNISHMENT OF WAR CRIMES . 58
By PROFESSOR H. LAUTERPACHT

THE UNIFICATION OF MARITIME INTERNATIONAL LAW IN TIME OF PEACE 96
By DR. C. J. COLOMBOS

INTERNATIONAL AGREEMENTS OTHER THAN "INTER-STATE TREATIES"—MODERN DEVELOPMENTS 111
By MR. J. MERVYN JONES

IMPLIED RECOGNITION 123

NOTES:

The Government of Occupied Territory—Professor H. A. Smith . . . 151
Legitimate Objectives in Air Warfare—Dr. J. M. Spaight . . . 158
The Mandated Territories during the Second World War—Professor Norman Bentwich 164
The Combined Raw Materials Board—Mr. Duncan Hall 168
Statelessness through the Peace Treaties after the First World War—Professor Norman Bentwich 171
British Nationality and Status of Aliens Act, 1943 176

DECISIONS OF ENGLISH COURTS INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW GIVEN IN THE YEARS 1939–42 180

DECISIONS OF ENGLISH COURTS RELATING TO TRADING WITH THE ENEMY IN THE YEARS 1939–43 222
Mr. E. F. Q. HENRIQUES

REVIEWS OF BOOKS:

Annual Digest and Reports of Public International Law Cases . . . 234
AMADEO, Santos P.: *Argentine Constitutional Law: The Judicial Function in the Maintenance of the Federal System and the Preservation of Individual Rights* . 234
BALOGH, ELEMER: *The Eternal Refugee: Political Refugees in Ancient Greece* . 234
BRIERLY, J. L.: *The Law of Nations* 235
COLOMBOS, C. J.: *A Treatise on the Law of Prize* 236

Reviews of Books (*cont.*)

Documents on International Affairs, 1938 236

Dolski, Alexander: *Kształtowanie Elementów Państwa* (*The Formation of Elements of Statehood*) 237

Domke, Martin: *Trading with the Enemy in World War II* . . . 237

The British Commonwealth at War 237

Farnsworth, A.: *The Residence and Domicile of Corporations* . . . 238

Feilchenfeld, E. H.: *The International Economic Law of Belligerent Occupation* . 239

Finch, George A.: *An Analytical Index to the American Journal of International Law and Supplements*, Vols. 15 to 34 (1921–40) and the *Proceedings of the American Society of International Law*, 1921–40 239

Frankenstein, Dr. Ernst: *Justice for My People* 239

Garner, James Wilford: *Studies in Government and International Law* . . 240

Transactions of the Grotius Society 240

Dillon, Colney Hall: *International Labor Conventions* 341

Higgins, A. Pearce, and Colombos, C. John: *The International Law of the Sea* . 241

Hudson, M. O.: *World Court Reports* 241

Keith, A. Berriedale: *Wheaton's International Law* 242

International Legislation: A Collection of the Texts of Multipartite Instruments of General Interest 243

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60 . 244

Diplomatic Correspondence of the United States: Canadian Relations, 1784–1860 . 245

The International Conferences of American States 246

The International Labour Code, 1939 246

Intergovernmental Commodity Control Agreements 249

Kaeckenbeeck, Georges: *The International Experiment of Upper Silesia* . 250

Mangum, Charles S.: *The Legal Status of the Negro* 252

Maurice, Sir Frederic: *The Armistices of 1918* 252

Maurice, Sir Frederic: *Lessons of Allied Co-operation* 253

McNair, Sir Arnold Duncan: *Legal Effects of War* 253

Nussbaum, Arthur: *Principles of Private International Law* . . . 254

Padelford, Professor Norman J.: *The Panama Canal in Peace and War* . 256

Proceedings of the American Society of International Law 257

Robertson, A. H.: *Characterization in the Conflict of Laws* . . . 257

Robinson, Jacob; Karbach, Oscar; Laserson, Max; Robinson, Nehemiah, and Vichniac, Max: *Were the Minorities Treaties a Failure?* . . . 259

Rogers, P. H. Thorold, *The Effects of War on Contract* 260

Schiffer, Walter: *Répertoire des Questions de Droit International Général Posées devant La Société des Nations*, 1920–40 360

Schwarzenberger, Georg: *International Law and Totalitarian Lawlessness* . 261

Sereni, Angelo Piero: *The Italian Conception of International Law* . . 361

Stone, Julius: *The Atlantic Charter* 363

Tomasevich, Jozo: *International Agreements on Conservation of Marine Resources* 263

Vance, I. T.: *The Background of Hispanic-American Law: Legal Sources and Juridical Literature of Spain* 264

Westphal, Albert C. F.: *The House Committee on Foreign Affairs* . . 264

Wigmore, John H.: *A Guide to American International Law and Practice* . 265

Winfield, P. H.: *The Foundations and the Future of International Law* . . 265

Wright, Quincy: *A Study of War* 265

Index 267

COMPARATIVE LAW AND THE LAW OF NATIONS

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THE use of the word "law" in connection with the comparative method of study and research is, in some respects, unfortunate because it has led to the adoption of competitive descriptions such as "Comparative Jurisprudence" and "Comparative Legislation" which create uncertainty and confusion as to the objects of comparison, and has also caused undue emphasis to be placed on one only of the many functions which the comparative process discharges, namely, its employment as an aid to the unification of private law. There is, of course, no such thing as "comparative" law; nowhere can we find any legal transactions or relationships which can be described as "comparative". The stages of analysis and synthesis of the rules of two or more systems of law which constitute the comparative process cannot and do not result in the formulation of any independent body of law. It would be preferable to use the term "comparative method" or some other phrase equivalent to the German "*Rechtsvergleichung*" which would indicate clearly that what is usually called "comparative law" is merely a form of legal technique capable of being utilised for an infinite variety of purposes. But the employment of the phrase "comparative law" is now too deeply rooted to be dislodged and no great harm will result from it so long as it is not permitted to exercise any restrictive influence on the purposes for which the comparative method exists.

Using the phrase "comparative law" in the sense indicated above, I propose—though with some diffidence—to attempt an examination of the question of the relationship between comparative law and the law of nations. The excuse for this intrusion by a comparative lawyer into the field of international law must be that the question has hitherto only been surveyed from the point of view of international lawyers whose chief concern has been to discuss the question of the admissibility or otherwise of the principles of private law for the purpose of filling the gaps which exist in the rules of the law of nations. There may, perhaps, be something to be said in favour of a different and more pragmatical angle of approach to the question, namely, a consideration of the extent to which and the manner in which the process of comparison can most usefully be employed for this particular purpose. The mere fact that a principle is to be found in several systems of private law does not, of course, invest that principle with the attributes of universality and entitle it to be translated into the international sphere. There may be—and often are—other factors to be taken into account which may have the effect either of depriving the principle of its apparent universality or of rendering it unfit to function in the environment of international relations. Statements such as that the "law of nations is but private law 'writ large' "[1] are apt to prove misleading. A high degree of caution is, in fact, essential before any private law principle or analogy can be accepted as conforming to the standard of universal or general recognition which has been adopted as the test for its employment for international purposes.

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[1] Holland, *Studies in International Law* (1898), p. 152.

Whether it is permissible or not to draw on private law sources and analogies for the purpose of the development of the law of nations is the subject matter of a controversy which not only lies outside the scope of comparative law but need not, it is submitted, concern us here because it is indisputable that in international practice resort is frequently had to these sources and analogies in connection with the settlement of international disputes. It is immaterial for our present purpose whether this practice involves the general recognition of private law rules as a source of international law or whether it is in the nature of an expedient only adopted *ad hoc* with the consent of the parties to a particular dispute. The resort to private law principles is in both cases limited to such as are "general" or "universal" or "common to civilized nations", etc., so that the tests which such principles must satisfy will be the same in either event.

If we approach this question as comparative lawyers there appear to be two main factors which govern the situation. In the first place, the basis on which the law of nations rests is made up of concepts taken from the civil law of Rome—however much these concepts may sometimes have been disguised in the garb of custom, reason or the law of nature. Secondly, there is the growing tendency—at least in modern times—to look beyond Roman law for any materials which may be required for the purpose of filling gaps in international rules. This tendency has become crystallized in Article 38 (3) of the Statute of the Permanent Court of International Justice which empowers the Court, if occasion arises, to apply the "general principles of law recognized by civilized nations". All systems of law are incomplete in varying degree, but the problem of filling in the gaps is, perhaps, more acute in the case of the law of nations than in that of private law owing to the absence of an international legislature having power to remedy any deficiencies which may be discovered. At present the task of laying down the appropriate rule must devolve on international tribunals to whom the settlement of disputes is entrusted and, if a *non liquet* is to be avoided, this is a duty which cannot be evaded. Unless the discharge of this duty is to be left to the uncontrolled discretion of the international judges the only alternative is that they should be furnished with some criterion of the sources to which they may resort. The inclusion, for this purpose, in Article 38 (3) of the Statute of the "general principles of law recognized by civilized nations" is the outcome of long experience gained over a long period of the settlement of international disputes by arbitration. It places the seal of international approval on a practice shown by such experience to provide a suitable criterion of the requirements of justice. As Professor Lauterpacht[1] observes, "that which had hitherto been done on the initiative of individual arbitrators or laid down in individual arbitration conventions has, in this way, received the sanction of the family of nations".

The first question which we have to consider is one of greater importance than is, perhaps, generally realised, namely, that of the weight to be attached to the Roman and non-Roman elements respectively in private law, when any attempt is made to discover a principle which may be deemed to be of general application. It is, of course, true that the law of nations, as we have it, is predominantly Romanistic in character; it is also true that many of the main systems of private law are founded on Roman law though not to the extent that is usually supposed. On the other hand the position must be faced that something like one-half of mankind is living at the present time under a régime of law which is of a different character, namely, that of the common law of England. If we count the nations of the world *per capita*, as has been the international practice hitherto, the situation is otherwise; the Romanistic systems are in a predominant majority and the common law may be pushed into the background. This is a factor in the scheme of international legal collaboration which may create misunderstanding and even friction. The common law nations are exposed to the danger of being "voted down" in international assemblies summoned to deal with legal matters. International tribunals are for the most part manned by jurists whose legal training and outlook is that of the Romanistic systems and who have little or no knowledge of common-law principles. It is as well to be frank on this question because it may afford the real explanation of the abstention on certain occasions of the common-law countries from many of the efforts made to secure international collaboration in matters of justice. If we regard the problem of the development of the law of nations in the light of present-day conditions there seems to be no justification for an attitude which would regard Roman law and the modern civil law systems as the sole source of the principles which can be craved in aid to fill in gaps in international law.[1]

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[1] *Private Law Sources and Analogies of International Law* (1927), pp. 67 and 68. See also Gihl, *International Legislation* (1937), pp. 82 and 83.

In any event, it is eminently desirable that we should clarify our minds as to the meaning of the phrase "Roman law" in this connection. Do we mean the classical law of Rome as taught at Oxford and Cambridge or the *usus modernus* developed by the Pandectists which consists to a considerable extent of principles which have nothing to do with Rome or the Romans?[2] As Maitland remarked, "Englishmen have often allowed themselves phrases which exaggerate the practical prevalence of Roman law on the continent"[3] of Europe. The law of Rome was only one of the sources from which the modern European codes have been built up. It may well be that there is sometimes "less difference between the approach of a common lawyer to a problem and that of a French jurist than between the approach of a French and a Spanish jurist".[4] Maine, writing in the latter half of the nineteenth century, failed to appreciate the extent to which non-Roman elements have percolated into modern continental law, and it is not improbable that Maitland had Maine in mind when he alluded to the tendency to attach undue weight to the existence of Romanistic principles in modern law.[5]

It would seem that this question of the meaning to be attributed to the phrase "Roman law" is one which does not admit of any ready answer. If the formulation of an entirely new rule of international law becomes necessary the position is somewhat different from that which arises when an international judge is merely called upon to give an extensive interpretation to a rule of international law which is already well established. In the former case Roman law must mean the *usus modernus* embodied in present-day systems of law as well as Roman law in the strict sense, because it would clearly be wrong to hark back solely to earlier forms of Roman law for the purpose of ascertaining whether a principle can be regarded as recognized or not by modern law. On the other hand, if an established rule of the law of nations derived from the classical texts, is to be adapted to new circumstances, it may be necessary to concentrate on the source from which the rule was originally absorbed into the law of nations and to emphasize the classical law of Rome for this purpose. The truth of the matter appears to be that international lawyers have used the phrase "Roman law" in a loose sense. At times it means the law as expounded in the texts of the Institutes and the Digest; at others it is merely a "portmanteau" phrase which serves to indicate that existing systems of law have adopted a principle which is based on the *usus modernus*. Subject to this the importance of the part which Roman law plays in the international sphere is beyond doubt and it becomes possible to agree with Maine's verdict that a knowledge of Roman law and its history "are equally essential to the comprehension" of international law. These considerations apply with special force to international lawyers whose training has been confined to the common law, for without some acquaintance with the concepts and terminology of Roman law they will be met at every point by "a vein of thought and illustration which their education renders strange to them".[1]

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[1] Lauterpacht, *op. cit.*, p. 178.

[2] Buckland and McNair, *Roman Law and Common Law* (1936), p. 9. The authors refer to the "*Willenstheorie*" of modern German law which is not derived from Roman law but from the philosophical writings of Kant.

[3] *English Law and the Renaissance.*

[4] Deák, *The Place of the "Case" in the Common and the Civil Law*, 8 *Tulane Law Review*, p. 337.

[5] See Maine, *Village Communities* (3rd ed.), p. 351 *passim.*

It would, however, be indefensible to treat Roman law, including the *usus modernus*, as the only sources from which materials are procurable for the development of the law of nations. To do so is to place a meaning on the phrase "principles recognized by civilized nations" which fails to correspond to the new situation which has arisen since the age of Grotius when the law of Rome was the basic element in almost the whole of the law of Europe and was universally regarded as the standard by which justice should be measured. Nor can we afford to ignore the contribution which the common-law systems are in a position to make towards the filling of gaps in the law of nations. Such concepts as those of estoppel, of the trust and of the strict performance of contractual obligations may well have an important part to play in the future in promoting the development of international law.

It is at this point that definite contact is established between the law of nations and comparative law because the extension of the field for the development of international law to other rules of law besides those of Roman origin involves the consideration of two problems which can only be solved by the aid of comparative study, namely (*a*) what are the attributes which a principle of private law must be deemed to possess if it is to be regarded as one which is generally recognized, and (*b*) what is there to be learnt in this connection from the experience which has been gained in the course of the application of comparison to the rules of private law?

The answer to the first question turns on the meaning of such words as "general", "universal" or "recognized", which have been employed in this connection. Is it essential that a principle should for this purpose be one which exists in identical form in every system of civilized law? Or, will it suffice if it can be found in substance in the majority of such systems? It would seem that the more generous of these criteria is to be preferred because to insist on precise similarity of rule in all systems of law would be to demand the impossible and so to destroy—or, at least, seriously diminish—the value of any resort to private-law sources and analogies. This conclusion is supported by the wording of Article 38 of the Statute of the Permanent Court of International Justice, which does not require recognition by *all* systems of civilized law as would have been the case if identity of rule is to be the criterion. If any real meaning is to be given to the words "general" or "universal" and the like the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognized in substance by all the main systems of law and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.

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[1] *Village Communities* (3rd ed.), p. 353.

The next question is whether the employment of the comparative method for this particular purpose presents any features which distinguish it from its use for other purposes. The answer is that it does not except in so far as the importance of the subject matter calls for the exercise of an even higher degree of care than usual. In particular, it is unwise to draw hasty conclusions from the *litera scripta* of any system of law because the provisions of a code or a statute which lay down a principle may be misleading unless they are read in the light of judicial interpretation or are considered together with other principles. So far as case law is concerned, it is possible to attach undue weight to a particular precedent as is sometimes done in the case of English law by continental jurists who are not familiar with the method by which the *ratio decidendi* of a decision is ascertained and with the processes by which apparent precedents are often "distinguished" by English judges on various pretexts. Above all, it must be remembered that the importance of a principle may vary in the different systems according to the political or economic structure of society in the countries concerned so that its meaning may have to be ascertained in the light of each of the political and social systems in which it is employed.[1]

It is not possible to enumerate the principles of private law which can be regarded as "general" principles which are "recognized by civilized nations". But it would seem that such principles must be rare, partly because there is little or no scope for the employment of any save the main principles of law for this purpose, and, partly because such exploration of the field as has been attempted appears to indicate that there are few principles of this description. Writers on international law who have dealt with this question have addressed themselves, for the most part, to an examination of the extent to which the existing rules of international law can be regarded as having a private law origin; but they suggest that in addition there are certain principles of private law which could be employed for the purpose of the further development of the law of nations. Reliance has been placed, for instance, on the principles of private law dealing with the impossibility of the performance of contracts, on the doctrine of the abuse of rights and on the principle which finds expression in the common-law doctrine of estoppel. It may, perhaps, be helpful to examine the claim for the recognition of these particular principles by international tribunals from the angle of comparative law. It is not suggested that an examination of this kind will furnish an answer to the problem with which we are dealing, but it may serve to stress the need for caution before the seal of recognition is placed by international lawyers on any given principle of private law and also to indicate the limits within which such recognition should be granted.

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[1] Friedmann, "Social Security and Developments in the Common Law", *Canadian Bar Review*, May 1943, p. 375.

The principle of "*pacta sunt servanda*" is one which is held in common by international and private law, but in both cases the same problem has arisen, namely, how far a supervening change in circumstances may, nevertheless, be treated as releasing the parties to an agreement from any further obligation to fulfil their promises. The doctrine of *clausula rebus sic stantibus* has been proposed as the solution of this problem, but it would seem that the doctrine has never been recognized and is, therefore, inadmissible in international disputes.[1] On the other hand it appears to be admitted that there is scope in international law for a different rule which would enable a contracting party to obtain relief from treaty obligations which it would be oppressive to enforce and would be "comparable to the legislative or judicial interferences which modify the obligations of private contracts in the interests of social order".[2] Reliance is placed for this purpose on such principles of private law as the English doctrine of the frustration of contracts, the theory of *imprévision* evolved by the Conseil d'Etat in France and the application by the German *Reichsgericht* of the principle of good faith (*Treu und Glauben*) to the catastrophic conditions brought about by monetary inflation. But whether it is possible to discover in these doctrines some underlying principle which is common to all these attempts to solve the problem and whether such principle, if it exists, could be adapted to the settlement of international disputes appears to be a matter of grave doubt. It is, of course, obvious that the environment in which such a principle would be required to function is not the same in the international as in the private sphere. This is so, not merely because the element of duress which so often accompanies the conclusion of international agreements rarely enters into the formation of private law contracts but because the problem as it arises in private law has an economic background which is very different from the political considerations which surround it in international law. The circumstances which can be regarded as excusing the further performance of a bargain entered into between individuals relate almost entirely to the rendering of services, the occupation of land or the transfer of proprietary rights. But quite apart from this, a comparison of the various private law solutions of the problem does not hold out much hope of the discovery of a principle which is recognized by all systems or even by a majority of them. The question was considered at some length by the Committee of the Rome Institute which prepared a draft international code of the law of sale for submission to the League of Nations and the conclusion arrived at was that any solution which could be reached for international purposes would have to rest on a basis different from that adopted by any of the systems of private law.[1] It was felt that the efforts of these systems to reconcile the formula *pacta sunt servanda* with the demands of justice had only resulted in the resort to principles either of a fictitious nature, such as that of the implied condition in English law, or to artificial concepts, of limited scope such as those of *imprévision* which it was impossible to define. It may well be that in the international sphere as well as in that of private law it is necessary that the courts should have power "in some form or other to take cognizance of the change of conditions subsequent to the creation of the obligation".[2] If so, it may be best in both cases to leave the matter to the discretion of the courts to be dealt with in accordance with their view of the demands of justice in the particular circumstances. This may, it is true, lead to varying results because judges do not always take the same view of the inferences to be drawn from facts of a similar nature. But the prospects of injustice would appear to be even greater if we were to try to "mechanize the law where a certain amount of pliability in its application is essential".[3] In any event the problem of the difficulties created by the *clausula rebus sic stantibus* is not one which can be solved by invoking the aid of private law except in so far as a moral can be drawn from the failure of private law to arrive at any solution which is common to all systems.

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[1] See Brierly, *The Law of Nations* (3rd ed., 1942), pp. 204–7; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 170, 171; Friedmann, *loc. cit.*

[2] Brierly, *loc. cit.*

As regards the doctrine of the abuse of rights: some writers, notably Lauterpacht,[4] rely on the doctrine as a general principle of private law which lends itself to employment in the international system. This doctrine has attracted a good deal of attention of late on the continent of Europe and has undoubtedly been recognized in varying degree by the law in France, Germany, Switzerland, and Soviet Russia.[5] It has also been referred to with approval by the Permanent Court of International Justice on two occasions.[6] In spite of this, it is difficult to accept it as a principle common to civilized nations. The doctrine is still in a formative stage and its implications are by no means clear. It is rejected by Italian law and the trend of judicial opinion in England is against its recognition as a general principle. Further, the doctrine is one which demands great caution in its application because of its possible subservience to ideological aims and the facility with which recalcitrant debtors can utilize it to escape from their obligations. It has on at least one occasion been put forward as argument justifying the repudiation of international indebtedness incurred towards an ally in time of war.[7] If the doctrine is to be absorbed into the law of nations it may be that this decision is not one which a comparative lawyer would be justified in challenging, but it is submitted that he is entitled to lodge an objection against the description of the principle as one common to civilized nations.

[1] *Rapport sur l'activité de l'Institut International de Rome pour l'unification du droit privé*, 1938–9, p. 10.

[2] See *Hirji Mulji* v. *Cheong Yue S/s Co.* [1926] A.C., *per* Lord Sumner at p. 510; *The Fibrosa Case* [1943] A.C., *per* Lord Wright at p. 70.

[3] Professor Winfield in *Pollock on Contracts* (11th ed.) at p. 235.

[4] *The Function of Law in the International Community* (1933), Chap. XIII. See also Friedmann, *op. cit.*, p. 373.

[5] See Gutteridge, "Abuse of Rights", *Cambridge Law Journal*, Vol. V, p. 22, and the authorities referred to there.

[6] Judgment No. 7 concerning German interests in Polish Silesia, Series A, No. 7, p. 30; Order of December 6th, 1930, in the Free Zones case, Series A, No. 24.

[7] See Gutteridge, *op. cit.*, p. 25, note (11).

A comparison of the rules of the various private-law systems can only have the result of proving that this is not the case.[1]

An aspect of the law of nations which, at first sight, may appear to present a promising field for the application of the results of comparative research, is that of the law of treaties. But it would seem that comparative law is, in this instance, only called upon to play a very modest part and that certain features of the private law of contract are inadmissible for the purpose. International law has its own rules with regard to the form of treaties and the capacity of the parties and their representatives. Theoretically, the private-law rules relating to reality of consent may have some bearing on the formation of international agreements, but it is significant that these rules have never been resorted to by international tribunals and little or no reliance is placed on them by writers on international law. It would, in any event, be difficult to derive very much in the nature of principles which are generally recognized from a comparison between the common-law rules dealing with mistakes and misrepresentation and the civil-law rules as to error and *dolus*. As regards the discharge of contracts, reasons have already been given for thinking that the private-law doctrines of frustration, *imprévision*, etc., will be of little, if any, assistance in the solution of the problem presented by the *clausula rebus sic stantibus*. The private-law rules relating to remedies for breach of contract, for example, the questions of the measure of damages and of the payment of interest, appear to stand on a somewhat different footing, and it is possible that a comparison of private-law rules might, in this instance, provide material for the development of international law. This, however, is a matter which demands a more detailed and careful investigation than it is possible to give it in this place.

The most interesting question which arises in the sphere of the law of contracts is whether international law can derive any help from private law in regard to the interpretation of treaties. There are, no doubt, certain principles of interpretation which are common to both systems, for example, the governing principle that an agreement is to be construed in accordance with the intention of the parties. There are also certain maxims of interpretation which are found in both systems, e.g., *generalia specialibus non derogant*. But there would seem to be little or no scope for the employment of the comparative process in this connection. The drafting of international agreements is carried out in conditions which make it desirable that the draftsmen should not be fettered by meticulous rules of interpretation and that such agreements should be construed in as large and liberal a spirit as possible. Even if it were desirable to resort to private law for the purpose there would appear to be very little to be gained by so doing. The divergences between the different systems of private law are such as to negative the existence of more than a very few rules which could be regarded as generally recognized. This is not the place in which to examine these divergences, but the situation may be summed up by saying that comparison reveals a "difference of psychological attitude and conception of the duty of the interpreter" in the various systems of private law.[2] In some systems the rules of interpretation are far more rigid than in others, so that greater importance is attached to the literal meaning of words. *Travaux préparatoires* may be resorted to by the judge in some systems; in others he is precluded from doing so. The judge is bound in some systems by precedents of interpretation; in others he has a free hand. In these circumstances it is obvious that the search for principles which are generally recognized will not carry the investigator very far. Comparison of private law rules may, it is true, be useful to the interpreter of a treaty in so far as it throws light on any "terms of art" which may have been used by the draftsman, but this appears to be an emergency measure to deal with a situation which should never have been allowed to arise rather than an expedient for general use.

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[1] *Contra*, see Lauterpacht, *The Function of Law in the International Community* (1933), Chap. XIII.

[2] Amos, "*The Interpretation of Statutes*", *Cambridge Law Journal*, vol. V (1934), at p. 174; see Allen, *Law in the Making* (3rd ed.), Excursus B.

The submission has already been made that if the phrase "general principles recognized by civilized nations" means that an international judge must not resort to a principle of private law unless it is one which is universally applied, then the contribution which comparative law can make to the development of the law of nations is bound to be of a meagre character. There are, no doubt, certain principles of this kind. Estoppel is a case in point, because it appears in all systems of civilized law either under its common-law designation or as an instance of the *exceptio doli* of Pandectal law.[1] It is also possible that the growth of more intimate intercourse and exchange of ideas between the lawyers of different jurisdictions may lead to a communion of thought which will have its repercussions in the international sphere and so ultimately prove to be the greatest service which comparative law can render to the development of the law of nations. There does not, however, seem to be any reason to believe that the framers of Article 38 of the Statute of the Permanent Court intended their language to be construed in any rigid sense. The situation which they had in mind resembles that in which a Swiss Judge is placed by Article 1 of his Civil Code, which directs him in case of need to fill a gap in the law according to the rules which he would lay down if he had himself to act as legislator, but with due regard to legal doctrine and judicial decisions. The object seems to be the same in the case both of Swiss law and of the Statute of the Permanent Court, namely to provide the judge, on the one hand, with a guide to the exercise of his choice of a new principle and, on the other hand, to prevent him from "blindly following the teaching" of the jurists with which he is most familiar "without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice" if applied to the particular case before him.[2] In other words, a judge sitting in an international tribunal must not forget that he is an international judge, and before making use of a principle of private law on which to base his decision must test it by ascertaining whether it is one which finds acceptance in the main systems of civilized law. If this be the correct view of the purpose of the reference in the Statute to the general principles recognized by civilized law, then comparative law is not merely a mechanical process placed in the hands of the international judge in order to aid him in the discovery of principles of private law which can be used for the purpose of filling gaps in the law of nations. It furnishes him with an objective test by which he can measure the justice of a principle which he believes to be the correct one and proposes to apply to the facts of a particular case when the existing rules of the law of nations do not furnish him with the materials for a decision.

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[1] Friedmann, *loc. cit.*

[2] Williams, *Swiss Civil Code*, p. 64.

It is submitted that the value of the assistance which comparative law may be in a position to render in developing the rules of the law of nations cannot be measured solely with reference to its possible use as a means of discovering such principles of private law as are held in common by all systems of law and are, therefore, to be regarded as ripe for absorption into international law. It depends above all on its employment as a corrective to any tendency there may be on the part of international judges or lawyers or on the part of the draftsmen of treaties to employ concepts or rules which either belong exclusively to a single system or are only to be found in a few of such systems. The possible consequences of any such tendency have been summed up in the following words by the writer who has devoted most attention to the question of the part to be played by private law as a source of the law of nations: "To attribute to one system of a particular time and space the qualities of a universal law and to see in it a vehicle of the development of international law, may well result in checking that development."[1] If comparative study furnishes a means by which this danger can be avoided its value as an instrument for the development of the law of nations is undoubted, quite apart from any other services which the comparison of private law rules may be in a position to render to the cause of international collaboration in the field of justice.

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[1] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 178.

THE LAW GOVERNING STATE CONTRACTS

By F. A. MANN, LL.D. (Lond.)

I

THE growing assumption by the State of commercial and industrial activities, both in the domestic and the international field, is a phenomenon which in many respects requires a revision of traditional legal thought.

The necessity for a new approach is particularly evident in connection with the classification of State contracts from the point of view of international law. At present this legal analysis is overshadowed by the widely accepted dogma, not necessarily confined to those subscribing to the dualistic view of international law nor altogether opposed by the monistic doctrine, that there exists a clear-cut dichotomy of international public and private law in the following directions:

First, the relationship between States or other international persons is subject to public international law, while the relations between private persons or between a private person and a foreign state is governed by some municipal system of law (which is determined by the rules of conflict of laws), except in so far as universally recognized principles of customary international law have been incorporated into such municipal rules so as to become an ingredient thereof.[1]

Second, municipal tribunals are bound to apply municipal law, whether domestic or foreign; they have no authority to enforce an international right or duty, since the underlying transaction is needs "governed by other laws than those which municipal courts administer".[2] On the other hand, it is open to international tribunals to have resort to such legal conceptions of private law as express general principles.[3]

Whatever the theoretical or jurisprudential justification of these distinctions may be, modern economic and social developments have resulted in blurring them to an appreciable extent and in blending the two branches of law. These tendencies have produced the effect, among others,[4] that, on the one hand, there are what prima facie appear to be transactions under municipal law which are based upon and determined by inter-state arrangements and that, on the other hand, there are inter-state arrangements, prima facie governed by public international law, which are "commercialized", i.e. to use for the moment a neutral description, brought under the influence of some municipal system of law. This tendency is shown nowhere more clearly than by a variety of international financial transactions, chiefly of the inter-war period.

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[1] The statement in the text is supported by numerous authors. The following remark of Sir John Fischer Williams is typical (*Chapters on Current International Law and the League of Nations*, 1929, at p. 259): "When the debt is from State to State, we have at once a relationship within the sphere of international law . . .; where the contract from which the debt arises is between a State and a foreign individual, the matter becomes one of international law in the strict sense only if and when the State of the individual makes his cause its own and addresses itself diplomatically to the contracting State." Or see the Arbitral Tribunal France-Chile, Award of 5 July 1901, in Descamps-Renault, *Recueil*, 1901, 370: "Les rapports entre l'Etat emprunteur et les particuliers preneurs de l'emprunt . . . relèvent exclusivement du droit privé et ne peuvent en aucun cas tomber sous l'empire des règles du droit de gens qui régissent les rapports juridiques des Etats entre eux . . . et non pas les rapports contractuels formés entre un Etat et un particulier."

[2] *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P.C.C. 22, 75, *per* Lord Kingsdown; Lord Halsbury L.C. in *Cook* v. *Sprigg*, [1899] A.C. 572, 578.

[3] See Art. 38 of the Statute of the Permanent Court of International Justice; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); and the literature collected in Oppenheim (-Lauterpacht), 5th ed., I, p. 22.

[4] See Friedmann, *British Year Book of International Law*, 1938, p. 118.

It is one of the objects of the following observations to submit that, taking cognizance of these developments, both municipal and international tribunals should, in certain cases, be guided by considerations which may tentatively be formulated as follows:

It is not impossible that transactions between national persons are, at least partially, governed by those super-national principles of law which are the tools of public international law, and that transactions between international persons are governed by a national system of law. A problem of the choice of law is involved; it is the intention of the parties that determines the "proper law" of the contract in the sense of the branch of law applicable to it.

If it were the only purpose of this paper to make these suggestions of a somewhat academic character, they would perhaps not at present merit publication, having regard to the further refinements and subtleties with which they would seem to overburden a topic already bristling with difficulties. Their justification lies in the hope that they may contribute not only to the elucidation of the particular field of the law of international finance which, but for some studies of great value,[1] has received only scant attention from international lawyers[2] and to which the present writer hopes to revert in a more comprehensive manner at a later date, but also to the development of that general body of international law of the future which will have to "embrace economic and social as well as political matters".[3] Writing on "International Law and International Financial Obligations arising from Contract", Sir John Fischer Williams remarked twenty years ago:[4] "The task of the international lawyer in this field is not so much to build up a law of contract . . . as a law of international execution and bankruptcy." To-day this view would appear to be too narrow. At a time when suggestions for the international organization of currency, banking, food, aviation and so forth are being authoritatively discussed, the realization of such plans clearly requires, *inter alia*,[5] an international law of contract. But if a review of some aspects of the present position would do no more than to bring home prevalent shortcomings and to indicate the directions in which reform is necessary, its wider purpose would be achieved.

One of these directions should perhaps be mentioned at once. None of the problems touched upon in the following remarks would arise, if draftsmen availed themselves of the remedy which is at their disposal, viz., to make express provision for the law applicable to the transactions which they are called upon to bring into legal shape. But it is only in exceptional cases that such provision has been made. Since one must exclude as an explanation the draftsmen's desire to keep their fellow lawyers busy, this phenomenon remains mystifying. The present writer would have no regrets if he contributed to its burial.

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[1] Particularly the various lectures by Sir John Fischer Williams collected in *Chapters*, pp. 257–419; also Hague Academy, *Recueil des Cours*, 34 (1930), p. 81; Borchard, *Proceedings of the American Society of International Law*, 1932, p. 134.

[2] The available literature is largely of a descriptive character and concentrates on what is called state bankruptcy and execution.

[3] Report on the "Future of International Law", *Transactions of the Grotius Society*, 27 (1942), p. 291.

[4] *Chapters*, p. 262.

[5] See Jenks, "Some Legal Aspects of the Financing of International Institutions", *Transactions of the Grotius Society*, 28 (1943) 87; Friedmann, "International Public Corporations", VI *Modern Law Review* (1943) 185.

II

The legal character of debts of states to foreign individuals has of late become fairly clear inasmuch as all attempts[1] to regard them otherwise than as contractual obligations in the sense of private law have failed. It is no longer possible to say that the obligation of the debtor state is binding not in law, but in honour only;[2] that it is a "public" debt, not only in the sense of a state's internal financial administration or constitutional law, but also in the sense of a debt subject to mere administrative discretion;[3] that its recognition or non-recognition no less than its creation is an act of unfettered sovereignty.[4] These views were derived partly from a confusion of the constitutional power or authority of making contracts and the duty of fulfilling them, when validly made,[5] partly from a misunderstanding of the true nature and significance of sovereignty, and partly from an exaggeration of the impact of the fact that, unless they waive their rights, states are immune from the jurisdiction of courts other than their own and that some[6] states are not even subject to the jurisdiction of their own courts. In a memorable decision which is both influenced[7] by and highly important for public international law, the Supreme Court of the United States of America said:[8] "But the right to make binding obligations is a competence attaching to sovereignty.[9] . . . The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts." There are in fact many recent decisions in which the highest courts of various countries have recognized the binding quality of the state's debt to foreign creditors;[10] and it is on this basis that public international law will have to put a state's foreign indebtedness when it comes to deal with such matters as are its primary concern, viz., state responsibility, intervention, execution, financial control.[1]

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[1] The most important among them is connected with the name of Dr. Luis Drago, then Foreign Minister of the Argentine Republic, and the doctrine which he propounded in his Note of December 29, 1902, to the United States of America and, subsequently, in several articles. See the literature collected in Oppenheim (-Lauterpacht), I, p. 253, note 3, and the criticism by Fischer Williams, *Chapters*, pp. 272 sqq.

[2] This view, which was already rejected by Grotius, Book II, ch. 14, s. vi, was expressed *obiter* by Sir G. Jessel, M.R., in *Twycross* v. *Dreyfus* (1877), 5 Ch.D. 605, 616, and by many writers, particularly v. Bar, *Private International Law* (translation Gillespie), p. 1112 (1892); Politis, *Les emprunts d'état en droit international* (1894). And see the writers quoted by Borchard, *loc. cit.*, p. 144, note 20.

[3] See Borchard, *loc. cit.*, also Jèze, Hague Academy, *Recueil des Cours* 7 (1925), 174.

[4] This was the essence of Drago's doctrine.

[5] This point is rightly stressed by Strupp, "L'Intervention en matière financière, Hague Academy, *Recueil des Cours* 8 (1925), 1, at p. 64.

[6] But by no means all of them. In pre-Nazi Germany, e.g., the contracts of the Government were "civil disputes" in respect of which the courts had unrestricted jurisdiction.

[7] The sentence quoted in the text is supported by a reference to Oppenheim, 4th ed., I, secs. 493, 494. The court points out that international engagements are not without legal force even though there may be no judicial procedure by which they could be enforced.

[8] *Perry* v. *United States*, 294 (1934), U.S. 330, 353, 354, *per* Chief Justice Hughes.

[9] It is remarkable how similar the language of the Permanent Court of International Justice was in *The S.S. Wimbledon* (Series A, No. 1, at p. 25); "But the right of entering into international engagements is an attribute of State Sovereignty."

[10] *England*: *International Trustee for the Protection of Bondholders A.G.* v. *The* [*King*] 1937 A.C. 500; *France*: Cass. Civ., May 31, 1932, *Rev. Crit.*, 1934, 909 (Etat Français *c.* Carathéodory);

Nor is it helpful to distinguish between state debts in general and bonds of public debt in particular[2] or to say of the latter type of transactions that it is of "a mixed private and public nature", "that it is not purely an international contract, for this could be concluded only by states and not by a state and the subjects of another state", but that it is "by its nature under the protection of international law and is what Bluntschli called a quasi-international contract".[3] Such descriptions in reality explain not the legal character of a state contract, but diplomatic practice relating to its international protection which, it would appear, is very largely discretionary and hardly lends itself to the rigour of legal principles.

If, then, a state debt to foreigners is a contract within the accepted meaning of municipal law, the question arises of determining its "proper law". It is generally recognized that, although a state debt is in the usual case "charged on and issued out of"[4] the state's public funds, it may be subject to a law other than that of the debtor state;[5] the only controversy is to what extent the personality of the debtor raises a presumption in favour of its own legal system.[6] The law governing a state debt as well as that govern-

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[*Note continued from previous page.*]

Sweden: Supreme Court, January 30, 1937, *British Year Book of International Law*, 1937, 215 and 36 (1937), *Bulletin de l'Institut Juridique*, 334; *Norway*: December 8, 1937, 38 (1939) *Bulletin de l'Institut Juridique International*, 71; *Austria*: November 26, 1935, *Zeitschrift für ausländisches und internationales Privatrecht* 9 (1935), 891; July 10, 1936, *ibidem* 11 (1937), 269; *Switzerland*: Court of Appeal at Bâle, November 29, 1935, 34 (1936), *Bulletin de l'Institut Juridique International*, 322 (*obiter*); *Morocco*: Trib. Mixte at Tangier, May 18, 1935, *Rev. Crit.*, 1936, 131. As to *Germany* see Supreme Court, April 14, 1932, *R.G.Z.* 1937, 1 (not an international case). Strupp, Hague Academy, *Recueil des Cours* 8 (1925) 1, 61 sqq., recognizes the contractually binding character of the state debt, but concedes to the State "le pouvoir de modifier ce contrat par la voie législative" (p. 65), provided that the modification is not arbitrary—an untenable suggestion. The private-law character is also accepted by Sack, *Les Effets des Transformations des Etats sur leurs Dettes Publiques* (1922), pp. 30–6, and by a growing number of modern authors: see Borchard, *Proceedings of the American Society of International Law*, 1932, 145, note 21. It is noteworthy that the contracts of the Soviet Trade Delegations were everywhere subject to the local law: see, e.g., German-Soviet Treaty, October 10, 1925, (*R.G.Bl.*, 1926, II, 14), Art. 3; Franco-Soviet Treaty, January 11, 1934 (*Rev. Crit.*, 1934, 521), Art. 6.

[1] See the literature referred to by Oppenheim (-Lauterpacht), I, 278, note 1 (on Responsibility); p. 255, note 3 (on Intervention and Control); and Strupp, Hague Academy, *Recueil des Cours*, 8 (1925), 1.

[2] This distinction, originally suggested by Drago, is strongly emphasized by Borchard, *The Diplomatic Protection of Citizens Abroad* (1928), pp. 284 sqq., but is rejected by Hall, *International Law*, p. 334; Hyde, *International Law*, I, p. 560; Eagleton, *The Responsibility of States* (1928), pp. 176 sqq.

[3] Borchard, *loc. cit.*, pp. 302 sqq., 304, 305. It has not been possible to identify Borchard's reference to Bluntschli, *Das Moderne Völkerrecht der Civilisierten Staaten*, 1878, 3rd ed., ss. 433 (b), 442. The French editions of 1870 and 1895 under the title *Le Droit International Codifié* do not appear to contain a statement supporting Borchard's statement. Schmitthoff, "The International Government Loan", *Journal of Comparative Legislation*, 3rd Series, 20 (1937), 179, asserts that the international government loan is a contract of a peculiar character which cannot be classified under any existing category. This is of little positive value.

[4] This is the phrase usually employed in British legislation authorizing the issue of bonds or guarantees; see, e.g., Austrian Loan Guarantee Act, 1933, s. 1, and many similar statutes.

[5] See the decisions mentioned above, p. 13, note 11.

[6] The existence of the presumption is asserted by the Permanent Court of International Justice in the *Case of the Serbian and Brazilian Loans* (Series A, Nos. 14 and 15, at pp. 42, 121, and German Supreme Court, November 14, 1929, *R.G.Z.* 126, 196.

ing any other debt is the law of a specific country which is determined by the express or implied intentions of the parties.[1]

It was the traditional method of localizing a transaction which lawyers employed when they came to deal with certain state contracts which, owing to their origin, character, and object, presented new and somewhat revolutionary aspects. If the British Government's issue of 5½ per cent. Gold Dollar Bonds of 1917 which had to be considered by the House of Lords in *The King* v. *International Trustee for the Protection of Bondholders A.G.*,[2] is being compared with such transactions as a number of loans issued under the auspices of the League of Nations,[3] the German External Loan 1924 (Dawes Loan)[4] or the German Government International 5½ per cent. Loan 1930 (Young Loan), it becomes evident that the latter type of transaction involves features making it clearly distinguishable from the well-known and orthodox structure on which the British issue of 1917 was built. In fact these circumstances are such as to justify the question whether they necessitate something other than the traditional approach and its concomitant attempt of determining a territorial "seat" or, in other words, of localization. The import of this question is impressively shown by the Young Loan which may conveniently be selected for more detailed discussion.

The German Government International 5½ per cent. Loan 1930 originated in the following circumstances: In its report published in June 1929[5] the Young Committee recommended that Germany be permitted to discharge its reparation debt by certain annuities which were to be partly unconditional and non-postponable, and partly postponable, and of which the former were later fixed at RM 612,000,000.[6] It was one of the essential features of the plan that it provided "for the conversion of the reparation debt from a political to a commercial obligation"[7] and aimed at assimilating that debt

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[1] That the proper law of a contract is determined by the parties is an indisputable doctrine which is firmly established in this country (see, e.g., *International Trustee for the Protection of Bondholders A.G.* v. *The King*, [1937] A.C. 500, 529, *per* Lord Atkin) as well as abroad (see Haudek, *Die Bedeutung des Parteiwillens im Internationalen Privatrecht*, 1931, or Mann, *British Year Book of International Law*, 1937, 97, and the cases and literature there mentioned). It is, however, to some extent doubtful whether the parties' freedom of choice is subject to any restrictions; see below, note 1, p. 19. All the formulations of the doctrine express the necessity for submitting the contract to the law of a particular country.

[2] [1937] A.C. 500.

[3] Particulars of the bonds issued by Austria, Hungary, Greece, Danzig, Bulgaria and Esthonia are published in the Annual Reports of the League Loans Committee (London) and of the Council of Foreign Bondholders. The Austrian Government Guaranteed Loan, 1923–43, made in pursuance of the Agreement of October 4, 1922 (Cmd. 1765), and authorized by s. 2 of the Trade Facilities and Loans Guarantee Act, 1923, and the Austrian Government Guaranteed Conversion Loan, 1934–59, made for the conversion of the old issue in pursuance of the Protocol of July 15, 1932, and authorized by the Austrian Loan Guarantee Act of 1933, s. 1, are particularly interesting from a legal point of view. They involve both the appointment of Trustees and State Guarantees and seem to have influenced in many respects the International Convention on Financial Assistance signed at Geneva on October 2, 1930 (Cmd. 3906, and Hudson, *International Legislation*, V, No. 270). The original loan led to an opinion by the Austrian Supreme Court (November 26, 1935, *Zeitschrift für Ausländisches und Internationales Privatrecht*, 9 (1935) 891), which is discussed by Plesch and Domke, *Die Oesterreichische Völkerbundsanleihe* (1936); Pirotte, 34 (1936), *Bulletin de l'Institut Juridique International*, 7. The Austrian International Federal Loan of 1930 led to a decision of the Austrian Supreme Court of July 10, 1936, mentioned in note 11, p. 13.

[4] Issued in accordance with the "Reports of the Expert Committees appointed by the Reparation Commission" (1924), Cmd. 2105.

[5] Cmd. 3343.

[6] Art. VII of Annex I to the Hague Protocol of August 31, 1929. The text of the Hague Agreements is published in Cmd. 3764 and in Vol. V of Hudson, *International Legislation*.

[7] *Loc. cit.*, p. 5.

"as closely as possible to an ordinary commercial obligation ('commercialization')"[1] so as to remove it "from the sphere of inter-Governmental relations".[2] This object was to be achieved by the formation of the Bank for International Settlements. The Hague Conference accepted these recommendations.[3] The decision to form the Bank was carried into effect by an agreement with Switzerland[4] to which the Constituent Charter was annexed and in pursuance of which the Bank was incorporated in Switzerland; it is therefore fairly evident that the Bank cannot be regarded as an international person, but is a Swiss Corporation.[5] Under a Trust Agreement (Contrat de Mandat, Treuhandvertrag) settled at The Hague[6] the Bank was appointed the Creditor Governments' "joint and sole trustee to receive, manage and distribute the annuities" which were to be "employed and distributed" as laid down in the Agreement "on the understanding that the obligations of the Trustee in regard to the said sums shall be only those normally incumbent upon a banker for the execution of a trust agreement".[7] Consequently, the German Government handed to the Bank a Debt Certificate containing "a solemn engagement" to pay the annuities to the Bank.[8]

The Young Committee, however, in this respect following the example of the Dawes Committee of 1924,[9] also envisaged the "mobilization" of portions of the unconditional annuities,[10] i.e. the device "of raising money by the issue to the public of Bonds representing the Capitalization" of those portions. Accordingly the Hague Agreement included a Mobilization Agreement[11] promising Germany facilities for the issue on the international markets of reparation bonds of a total amount of 300 million dollars and providing for such operations to be "carried out through the Bank for International Settlements". This Agreement was amplified by a further Agreement signed in Paris on 10 June 1930[12] in which the terms of the General Bond submitted by the Bank for International Settlements were approved by the Creditor Governments; this bond which was attached to the Paris Agreement became part, and was printed on the back of, the Definitive Bonds issued later in nine European countries on the basis of a prospectus advertised on 12 June 1930.[13] It contained the German Government's acknowledgment that it was indebted to the Bank in the total amount of the loan (Art. VII), and its undertaking to pay the service moneys "in accordance with the provisions of the Hague Agreements" to the Bank (Art. IX) and also a covenant to pay principal and interest to the Bondholders (Art. VII). The Bond included a well-defined gold-clause,[1] but while, in the event of a divergence, the English text was made to prevail (Art III.), there was no clause dealing with the law applicable to the Bond or the question of jurisdiction.[2]

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[1] *Loc. cit.*, p. 28. [2] *Loc. cit.*, p. 7.

[3] Clause 2 of the Hague Protocol of August 31, 1929; Agreement of January 20, 1930.

[4] Convention respecting the Bank for International Settlements of January 20, 1930.

[5] Gutzwiller, *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*, 1933, 116; Martin Wolff, *Internationales Privatrecht* (1933), p. 73, note 27; Hudson, *American Journal of International Law*, 1930, 561; Schwarzenberger, *Die Internationalen Banken* (1932), 51 sqq.; *contra* Schlüter, *Die Bank für Internationalen Zahlungsausgleich* (1932), 380 sqq., 400.

[6] Annex VIII to the Agreement of January 20, 1930.

[7] Preamble and Art. IV of the Trust Agreement.

[8] Annex III to the Agreement of January 20, 1930.

[9] Cmd. 2105.

[10] Cmd. 3343, p. 28.

[11] Arrangement as to the Mobilization of the German Annuities.

[12] Hudson, *International Legislation*, V, No. 261.

[13] The prospectus advertised in *The Times* and other national newspapers of June 12, 1930, is very instructive. It stated that the issue was made with the approval of H.M. Government under the Hague Agreements of January 20, 1930.

Of the numerous interesting and important legal (as well as political and financial) problems to which this Bond gives rise, a few had to be decided by the Swiss courts.[3] Notwithstanding the fact that in September 1931 Sweden went off the Gold Standard, the Reich continued until the end of 1932 to pay interest on the Swedish tranche of the loan at the gold rate. In May 1933, however, i.e. after Hitler's accession to power, the Reich notified the Bank that in future it would pay interest on the English, American and Swedish tranches of the loan at the nominal value,[4] and it adhered to this attitude in spite of the Bank's protest.[5] When the service moneys were received by the Bank, it allocated them to the seven tranches according to the nominal value, so that the holders of bonds denominated in currencies which had depreciated received less in terms of gold than those holders whose bonds were denominated in such currencies as at the time were still on a gold basis. The plaintiffs, holders of bonds of the Swedish tranche, brought an action for damages against the Bank, alleging that the payments received by the Bank ought to have been distributed equally among all the holders. There was little substance in this claim and the dismissal of the action would appear to have been inevitable.[1] The really interesting point lies in the line of reasoning adopted by the courts. They were faced with the problem of defining the duties of a "trustee" of a most special character. In the traditional manner they set out to discover the law governing the Bank's obligations. They held that, since there was no express stipulation in the bond and since both the place of performance and the Bank's domicile were in Switzerland, Swiss law applied, and the Court of Appeal at Bâle added that according to Swiss rules of classification even the German Government's obligations were subject to Swiss law. According to Swiss law, which does not include a law of trusts and trustees, the Bank's duties arose under a contract which the Federal Tribunal described as a tripartite agreement *sui generis* and the effect of which was to be exclusively determined by the terms of the bond. The Federal Tribunal continued that the bondholders had direct rights of action against the Reich and that the Bank was not "sole debtor",[2] but mere intermediary between the bondholders as creditors and the Reich as debtor and, at the same time, representative of the bondholders. On this basis it was concluded that the Bank could disregard the Reich's instructions only if "they constituted an absolutely unjustifiable violation of the contract". While the Tribunal regarded the Reich's attitude as irreconcilable with the terms of the bond, it inferred from the Reich's arguments that

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[1] Art. VI, Sub-Clause (f) gives the Bank for International Settlements wide powers of interpretation. The full text of the General Bond, which is a document of fascinating interest, is published in Hudson, *International Legislation*, V, pp. 575 sqq.

[2] When in 1932 the Powers met at Lausanne "with the firm intention of helping to create a new order", they put a complete end to German Reparations: Agreement of July 9, 1932, Cmd. 4126; Hudson, *International Legislation*, VI, No. 311. In the absence of ratification this Agreement never came into force. According to Art. VII it was without prejudice to the rights of the bondholders of the Young Loan, but it also provided that any necessary adaptation of the machinery relating to the Reich's obligations in respect of the Young Loan was a matter for mutual agreement between the Reich and the Bank for International Settlements. It is very difficult to see how the Bank could have entered into such arrangements so as to bind the bondholders.

[3] Civil Court at Bâle, April 20, 1935, *Bulletin de l'Institut Juridique International*, 33 (1935) 148; Court of Appeal at Bâle, November 29, 1935, *ibidem* 34 (1936) 322; Federal Tribunal, May 26, 1936, *B.G.E.* 62 (1936), II, 140; *Rev. Crit.*, 1937, 138.

[4] On May 8, 1933, the Reich's Minister of Finance wrote to the Bank referring to English judgments which, notwithstanding the presence of a gold clause, permitted payment at the nominal value. These probably were the decisions of Farwell J. and of the Court of Appeal in *Feist* v. *Société Intercommunale Belge d'Electricité*, [1933] Ch. 684, rendered on October 27, 1932, and March 17, 1933, respectively. They were reversed on December 15, 1933, by the House of Lords: [1934] A.C. 161. When the court of first instance at Bâle pronounced judgment the Reich's argument had therefore collapsed. In so far as can be seen from the Reich's letters published in the Swiss reports, they do not contain any hint of the reprisal theory mentioned in the Federal Tribunal's judgment and indicated below.

[5] It would be very interesting to know why the Bank felt entitled to refrain from further action of the kind indicated in the text below. The Reich defaulted in respect of the payments due both under the General Bond and under the Hague Agreements (which served as security under Art. IX of the Bond). The Bank's reply to the Reich of May 18, 1933, gives the impression that it intended to claim against the Reich only "in the event of bondholders claiming damages from the Trustee on account of alleged breaches of its duties resulting from the General Bond". The attitude subsequently adopted by the Bank appears from its Annual Reports. As from July 1, 1934, the Reich failed to make any payments to the Bank at all, but it made certain special arrangements with various Governments which, according to its 8th Annual Report (pp. 109, 110) the Bank "considered as incompatible with the General Bond and the international agreements relating thereto". The special arrangements with this country are contained in the Anglo-German Transfer Agreement, 1934 (Cmd. 4640) Art. 2, the Anglo-German Payments Agreement, 1935 (Cmd. 4963) Art. 7, and the Anglo-German Transfer Agreement, 1938 (Cmd. 5788) Art. 2. It was expressly provided that, without prejudice to the rights of holders, coupons would be purchased on the basis of the nominal value and not on a gold basis.

> "from the point of view of public international law a reprisal against those States was involved, which, having abandoned the gold standard, have injured the interests of German subjects by their failure to fulfil obligations subject to a gold clause. The defendant was not called upon to decide whether the Reich had such right of reprisal or whether the non-observation of the terms of the contract was justifiable from the point of view of public international law. . . . It sufficed for the defendant that the Reich's point of view was not manifestly untenable. . . . Since it expressly reserved the rights of the bondholders against the Reich, it is impossible to say that it has broken the duties imposed upon it by the contract of loan towards the bondholders".

This decision, which certainly cannot be counted among the outstanding achievements of that august court, proves the hopelessness of the attempt to press a highly unusual transaction into forms not made to fit it. It would have been equally inappropriate in conformity with the defendants' argument to apply "Anglo-Saxon" law.[3] No careful reader of the General Bond will find it difficult to think of rules of English law which it would be unreasonable to apply to this instrument.

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[1] If the Bank had acted in the manner contended for by the plaintiffs it would have violated the principle of equality and exposed itself to a claim by the holders of bonds denominated in currencies still on a gold standard. The Bank's defence made this point, but also made others which make astonishing reading. It said that by protesting it had done the "only proper and possible" thing. *Sed quaere.* It also said that Art. VI (f) gave it an "absolute discretion" and that "without considerable limitation of its responsibility . . . it would, in view of the obscure legal situation, not have accepted the office of trustee"—an office, let it be remembered, for which the Bank was formed.

[2] This passage suggests that the courts had great difficulty in appreciating the conception of a trust. There is a clear confusion between the debt of the Reich towards both the bondholders and the Bank under the General Bond and the debt of the Bank towards the bondholders in respect of the amount paid by the Reich and available for distribution.

[3] The Courts pointed out that no such law existed.

In these circumstances it is suggested that the formula according to which a contract is to be localized in a particular country is too narrow. It is the *legal system* to which a contract is subject. This legal system may be chosen by the parties. It is disputed to what extent the parties' freedom of choice is restricted. But whether it is *mala fides*, unreasonableness or lack of actual connection that invalidates their decision,[1] if one party to a contract is an international person, particularly a state, there exists *ipso facto* a sufficient connection with super-national rules of law which, on any view of the proper law theory, may enable and justify the parties to de-localize their contract and to submit it to what may be called public international law, i.e. to internationalize it. They may do this in order to make applicable the provisions of a treaty giving rise to their transaction or those general principles of law recognized by civilized nations with which publicists are conversant and which, though by no means fixed or easy to ascertain, are yet not so vague as to render a submission to them void for uncertainty. Such general principles as are referred to in Art. 38 of the Statute of the Permanent Court of International Justice will largely be private law to be ascertained on a broad comparative basis or to be deduced from the law of the particular group of countries with which the transaction is predominantly connected (Common Law, Latin Codifications, etc.) or even from the legal system of a particular country; but the law so found will have to be interpreted with such liberality and freedom as is allowed to an international court which is not compelled to "apply" foreign law in the strict sense and is, therefore, not bound by strict rules of construction, precedents, or similar peculiarities. If the conception of a trust or trustee is to be analysed, it would thus be possible to have resort to "Anglo-Saxon" principles (as opposed to technicalities), although neither English nor American law would "apply" to the clauses in question or would even have to be considered in other respects.

But the parties to a state contract may also refer to rules of strict public international law. Thus it is a principle of public international law that no state can rely on its own legislation to limit the scope of its international obligations.[2] A state contract which, according to the intention of the parties, is internationalized, may include a contractual adoption of that principle. It would be *nihil ad rem* to argue that its invocation is open only to persons who are subjects of international law; for that principle of public international law would apply not *ex lege*, but *ex contractu*. In state bonds it has become usual to provide that payments shall be made without deduction for taxes imposed by the debtor state and that payments shall be made in time of war as well as of peace and no matter whether the bondholders are subjects of a state friendly or hostile to the debtor state.[1] The difficulties to which such provisions obviously give rise if the bond is subjected to the law of a particular country or even to the law of the debtor state, are overcome by the internationalization of the contract. Such a view would ensure, generally, that municipal legislation, for instance, the abrogation of gold clauses or similar enactments, could not interfere with the terms of a contract which has international character; for a municipal court there would be only one restriction, viz., the public order of the forum. It would thus be possible to restrict the effect of that "absurdity" which, in an all too little known decision, the Supreme Court of the United States exposed; it held that, in view of Art. I, Section 10 of the Constitution preventing a state from "impairing the obligation of contract", a city could not so use its taxing power as to deduct taxes from the interest payable on its bonds:

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[1] According to the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*, [1939] A.C. 277, 290, the parties may select any legal system, provided the selection is made bona fide. The opinion, delivered by Lord Wright, has been attacked by Cheshire and Morris 56 (1940) *L.Q.R.* 320, and discussed by Gutteridge 55 (1939) *L.Q.R.* 323; Falconbridge, 18 (1940), *Canadian Bar Review*, 77; Kahn-Freund, 3 (1939) *Mod. L.R.*, 61, and others. On the various tests which have been suggested, see Martin Wolff, *Juridical Review*, 1937, 110; Mann, *British Year Book of International Law*, 1937, 98, 99. To a large extent the prevailing conflict of opinions lacks reality. No case has become known in which the parties' selection was held to be *mala fide*, unreasonable or arbitrary. For the purposes of the argument in the text the question need not be discussed at length.

[2] See, e.g., Permanent Court of International Justice, Case concerning the Free Zones of Upper Savoy and the District of Gex, Series A, No. 24, p. 12.

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. . . . Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."[2]

There exist a few instances of state contracts which, though *prima facie* subject to municipal law, have been submitted by the parties to international law rather than to the law of a particular country. The 5 per cent. 1932 and 1937 Bonds of the Czechoslovak Republic guaranteed by the French Government and concluded with French bankers contain the following clause:[3]

> Any disputes which may arise as to the interpretation or execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice at The Hague acting in execution of Art. 14 of the Covenant of the League of Nations. The Czecho-Slovak State undertakes to lay such disputes before the Permanent Court of International Justice whose jurisdiction it accepts.

The contract of loan entered into between Dutch bankers and the French Government in 1934 provides:[4]

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[1] These clauses are to be found in many state bonds issued in recent years: Young Loan (General Bond, Art. XVI); Austrian Government Guaranteed Conversion Loan, 1934–59, particularly Art. XX of the General Bond; Agreement between Roumania and J. Henry Schröder & Co. Ltd. of July 4, 1928, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, II (2), 1731, p. 322; French Loan mentioned in note 3 below; and others. Such provisions raise many difficult problems of law which have not yet been investigated. Could the British Government which has guaranteed payments to enemy holders of the Austrian Loan, rely on the Trading with the Enemy Act? It is submitted that the answer should be in the negative, for this among other reasons that the British guarantee is subject to public international law. Even if this is not accepted, the clause derives its validity from s. 1 of the Austrian Loan Guarantee Act, 1933, which authorized the Treasury to guarantee "in such manner as they think fit", and is not superseded by the Trading with the Enemy Act, 1939.

[2] *Murray* v. *Charleston*, 96 (1877) U.S. 432, 445, *per* Mr. Justice Strong, Miller and Hunt JJ. dissenting on the ground that the contract was made subject to the power of taxation. Vattel, *The Law of Nations*, Book II, §§ 214, 216, seems to equiparate state contracts with treaties made between sovereigns, and says the rights of the creditors of a state are "indefeasible".

[3] *Report of the Committee for the Study of International Loan Contracts*, League of Nations Publications (Economic and Financial, 1939, II, A. 10), p. 39.

[4] *Bulletin de l'Institut Juridique International*, 30 (1934), 279. The Bon du Trésor provides for payment "nonobstant toute disposition législative ou réglementaire éventuelle".

> L'Etat Français accepte de soumettre tous différends auxquels le présent Bon de Trésor donnerait lieu à la juridiction de la Cour Permanente de Justice Internationale de la Haye.

According to generally recognized principles[1] the submission to the jurisdiction of a specific court implies the submission to the law of such court. The above clauses, therefore, would appear to contain an almost express reference to the law which Art. 38 of its statute enjoins the Permanent Court to apply.[2]

It is this law which, it is suggested with diffidence, a municipal court should and can apply when dealing with an internationalized contract of a state.

In the absence of an express reference a state contract should be regarded as internationalized, if it is so rooted in international law as to render it impossible to assume that the parties intended it to be governed by a national system of law.[3] The Young Loan is a prominent example of such implied internationalization. It contains no reference to the law governing it—an omission which in a document of this type is hardly accidental. It resulted from the Hague agreements between the Creditor Governments and Germany to which the General Bond makes frequent reference. Its legal shape was determined or at least approved by the Powers. It has, as a superficial perusal of the bond discloses, no special connection with any of the nine countries participating in the issue.[4] Its lay-out is super-national rather than municipal. This becomes particularly clear, if regard is had to the fact (entirely disregarded by the Swiss Federal Tribunal) that the service moneys which the Reich acknowledged to owe both to the bondholders and the Bank for International Settlements are "secured" by the Reich's undertaking (Art. IX) to pay them in equal monthly instalments to the Bank "in accordance with the provisions of the Hague Agreement", two-thirds of such payments operating to discharge not only the debt under the bond, but also the unconditional annuities payable in substitution for the former reparations. Suppose the bondholders brought an action for damages against the Bank on the ground that it had failed to enforce the gold clause or any other of the Reich's liabilities. They would have to prove the Bank's duty to proceed, the remedies which would have been open to the Bank, and their success. They could allege not only the possibility of suing the Reich in its own courts or in the courts of any country where, under Art. 281 of the Treaty of Versailles, Germany has waived her immunity, but also, under Art. IX of the bond, the possibility of invoking the special Arbitral Tribunal set up under the Hague Agreements.[1] In such an action a Swiss Court would have to decide what result that Arbitral Tribunal would probably have reached. For this purpose public international law would undoubtedly have to be considered. There is no reason why a municipal court which may thus consider international law incidentally, should not also apply it directly so as to secure the submission of a single and indivisible instrument under a single legal system.

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[1] See, e.g., Dicey (-Keith), *Conflict of Laws*, 5th ed., pp. 667, sqq., or Battifol, *Les Conflits de lois en matière de contrats* (Paris, 1938), ss. 149 sqq. See recently Lord Wright in *Vita Food Product Inc.* v. *Unus Shipping Co. Ltd.*, [1939] A.C. 277, 280.

[2] The Trust Agreement between the Creditor Governments and the Bank for International Settlements (p.16 , note 7), the interpretation and application of which was subject to the jurisdiction of the special Tribunal provided for in the Hague Agreement of January 1930, would also have to be regarded as an international contract, although the bank is a Swiss corporation. It would be impossible to find a localized system of law to which it could be subject. In the result, Schlüter, *Die Bank für Internationalen Zahlungsausgleich* (1932), p. 400, is of the same opinion.

[3] At present these cases are, of course, exceptional. It is by no means intended to lay down any hard-and-fast rule or anything in the nature of a presumption.

[4] That the English text prevails (Art. III of the General Bond) is, of course, in no way decisive, though not irrelevant.

These suggestions[2] are made in full knowledge both of their tentative nature and of the necessity for further investigation and elaboration.[3] They are made with an equally clear realization of the fact that the developments which have been alluded to and which may come to be regarded as the kernel of much wider schemes of the future, involve a new departure requiring new methods. The intention of the parties, though often overworked, has long been known as one of the vehicles that connect old and new ideas. Although in the end it will lose its force and attraction as a doctrinal explanation, it has often proved to be, and may again become, a useful stepping stone at the beginning.

III

The conception of inter-state transactions primarily calls to mind those legal relations between states which, as Professor Lauterpacht[4] has put it, have "their roots in the ordinary and public functions of the State's imperium" and, accordingly, create "rights and duties of States as political entities endowed with attributes of government" so that they represent "not a case of *meum* and *tuum* in the judicial but in the political sense".[5] Such relations spring from treaties (in the narrow and, perhaps, popular sense of the word) made between states as sovereignties in respect of matters about which no person other than a sovereign state can contract. These transactions are clearly subject to public international law. They are not amenable to municipal jurisdiction on the principle that "wherever sovereign nations have contracted upon sovereign matters, the effect is a species of obligation *ex quo non oritur actio*".[6] They are of no interest to the following discussion except in so far as it is necessary to emphasize the two points of contact which they may have with private law. Conceptions or rules of private law may serve as a source, or analogy, of public international law applicable to the interpretation of the treaty.[1] Moreover, such treaties may refer to municipal law by that process which is known as incorporation,[2] reception,[3] or *renvoi.*[4] Nationality, taxation, currency, and many similar matters belong to municipal law and are, therefore, broadly speaking, subject to independent and unfettered regulation by a state. If and in so far as a treaty of the type in question refers to such aspects of a municipal system of law, there is, again broadly speaking, no longer room for the application of that fundamental principle of public international law according to which a state cannot, by the exercise of its legislative power, modify its international engagements.[5] Consequently, to paraphrase a dictum of Mr. Justice Cardozo,[6] such treaties, when dealing with a subject matter which lies within the control of municipal law, have a "congenital infirmity". Thus, if a treaty makes provision for the nationals of a country, that country's law determines the persons who are or are not nationals. Or if a treaty provides for the payment of a certain sum of money expressed in the currency of a particular country, it is the national law of that country that fixes the value of the currency; this means that the principle of nominalism[7] controls in the sphere of public international law no less than in private law. But if a gold clause is added, this probably does not involve the incorporation of municipal law[8] so that municipal legislation cannot affect it.[9] Difficult problems of classification and construction arise in connection with delimiting the extent of the incorporation of municipal law into treaties, but they are of a somewhat exceptional character and do not impair the general rule that treaties in the narrow sense of the word are exclusively subject to public international law.

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[1] Agreement of January 20, 1930, Art. 15 and Annex XII.

[2] It may be of interest to remind the reader that, in a special and limited sense, a doctrine of a "contrat international" emerged in France. According to J. Donnedieu de Vabres, *L'Evolution de la Jurisprudence Française en Matière de Conflit des Lois* (1938), pp. 553 sqq., 561, these tendencies prove "qu'il y a une activité économique internationale échappant à la souveraineté des législateurs particuliers et revêtue d'un statut juridique propre, irréductible au simple concours des lois internes en conflit".

[3] Four main points will have to be distinguished: (1) Can contracts be internationalized in the sense discussed in the text? (2) What type of contract may be so internationalized? The text only deals with state contracts. It is very doubtful whether and to what extent contracts between two private persons could be internationalized. (3) What are the consequences of partial or total internationalization, particularly in connection with the principle of state sovereignty? (4) What are the circumstances in which internationalization may be implied? In order to avoid misunderstanding it should also be made clear that we are not concerned with mere "incorporation" in the sense mentioned by Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*, [1939] A.C. 277, 291, 399, or by Dicey (-Keith), *Conflict of Laws*, 5th ed., p. 45, note r, or by Mann, *British Year Book of International Law*, 1937, 101. The "incorporation" of public international law into a private law contract would, of course, be possible, but its effects would be very different from those discussed in the text.

[4] *Private Law Sources and Analogies of International Law* (1927), p. 4.

[5] *Cherokee Nation* v. *Georgia*, (1831) 5 Peters 1, 28, 29, *per* Mr. Justice Johnson.

[6] *Nabob of the Carnatic* v. *East India Co.* (1791), 1 Ves.Jr. 370, at pp. 389, 390, *per* Lord Thurlow; similarly same case, (1793), 2 Ves.Jr. 56, at p. 59, *per* Chief Baron Eyre. These decisions were referred to with approval in the American case quoted in note 5, above.

With the political treaty, "actus . . . regis qua regis ad (quem) civiles leges non pertinent", already Grotius[10] contrasted another type of inter-state transactions: "quod si tales sint actus qui a rege sed ut a quovis alio fiant, etiam civiles leges in eo valebunt". It is indeed widely admitted[1] (though often ignored) that there are contracts made between states which may be and, perhaps, often are subject to private law determined by the ordinary rules of private international law[2] and which are, accordingly, amenable to the jurisdiction of municipal courts. The growth of state activities in the commercial and industrial field makes it a matter of daily occurrence that states and their administrative departments contract with each other in a manner which in no way differs from that prevailing between private persons or government-controlled companies. As a Swiss author has said,[3] from the legal point of view it is essentially immaterial whether Switzerland (where railways are state-owned) sells locomotives to a French railway company or to Germany (where railways are also state-owned). This group of inter-state contracts comprises such transactions as the sale of goods, the sale or leasing of land, loans, chartering a ship, issuing a bill of lading, and so forth. No case, however, seems to have come before the courts which involved litigation between modern sovereign states, and it is even difficult to find texts of inter-state agreements which are clearly subject to private law.[4] Perhaps the most significant instance is furnished by the Agreement of 9 August 1919, by which Great Britain made a loan of £2,000,000 to Persia.[5]

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[1] This is the theme of Lauterpacht's book mentioned, p. 22, note 4.

[2] Dicey (-Keith), *Conflict of Laws*, 5th ed., p. 45, note r; see above, p. 22, note 3.

[3] This is the expression used by Triepel, "Völkerrecht und Landesrecht "(1899), and "Les Rapports entre le Droit Interne et le Droit International", Hague Academy, *Recueil des Cours* 1 (1923), 77 sqq.

[4] This expression is used but criticized by Kaufmann, Hague Academy, *Recueil des Cours* 54 (1935) 447.

[5] P. 19, note 2.

[6] *Holyoke Water Power Co.* v. *American Writing Co.*, 300 (1936), U.S. 324.

[7] See generally, Mann, *The Legal Aspect of Money* (1938), pp. 59 sqq. The existence of the nominalistic principle in public international law requires further investigation which must have regard to the legal nature and effect of incorporation and to such decisions as *Murray* v *Charleston*, 96 (1877) U.S. 432, above, p. 20, note 2.

[8] Serious questions of the type indicated in the following sentence are involved. The problem arose in acute form in connection with the Panama Canal Treaty between the United States of America and Panama of November 18, 1903 (Martens, *Nouveau Recueil Général,* Série 2, Vol. 31 (1904), 599), which provided for the payment to Panama of an annuity of $250,000 in gold coin of the United States. Relying on the Joint Resolution the United States at first refused to pay in gold, but subsequently abandoned this point of view by the Convention of March 2, 1936 (*American Journal of International Law* (Supplement), 1940, 139). See Wolsey, *American Journal of International Law,* 1937, 300.

[9] In recent years a practice has arisen according to which treaties do not only contain a gold clause, but refer to and define an imaginary unit of currency: see, e.g., Art. 29 of the Universal Postal Convention of March 20, 1934 (Hudson, *International Legislation,* VI, No. 367) and many other treaties defining the franc as "the gold franc of 100 centimes of a weight of 10/31 of a gramme and of a fineness of .900".

[10] *De Jure Belli ac Pacis* (1625), Book II, ch. 14, s. VI.

In these circumstances the problem arises of defining the legal nature of such inter-state transactions as cannot readily be classified either as political treaties or as commercial contracts, or, in other words, of delimitating the boundaries between both categories. The intermediary class which necessitates serious consideration of this problem is very large and includes, in particular, agreements for the sale of war supplies, the acquisition of sites for battle monuments, the settlement of war debts, the division of booty, the joint construction of a tunnel or railway, and similar transactions originating from activities *regis qua regis*.

To a large extent the tests which have been suggested in the past coincide with those applied in certain continental countries for the purpose of qualifying the principle of state immunity in foreign courts.[6] Where the personal status of the defendant is held to be insufficient to secure immunity, the form of the transaction or its nature or the capacity in which the defendant state acted has been relied upon to decide whether the business was done *jure imperii* so as to guarantee immunity. All these tests, singly and in combination, recur in connection with the question under discussion. Decisive weight is being attached to the form of the transaction—was it concluded as a treaty or as a contract?[1]; to its nature—was it done in *commercio*[2] or in the exercise of and with reference to sovereign rights?[3]; to the functions assumed by the contracting states—did they act as sovereigns or as *fisci*?[4] A peculiar, but unfortunate, distinction was suggested by the Harvard Research on the Law of Treaties[5] which defines a treaty within the meaning of the Draft Convention as a "formal instrument of agreement by which two or more states establish or seek to establish a relation *under international law* between themselves"; the italicized words which are meant to exclude state contracts governed by municipal law contain no more than a begging of the question, and the *Comment*'s conclusion does not make the matter clearer; it requires of a treaty that the "obligation assumed is one between states, the engagement is recorded in a formal instrument and is governed by the rules of international rather than those of the municipal law of any party".[6]

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[1] See the authorities mentioned, p. 25, note 1, and, in addition, Hold-Ferneck, *Lehrbuch des Völkerrechts* (1930) I, 16; II, 8, 157; Feilchenfeld, *Public Debts and State Succession* (1931), p. 650. Some writers, however, maintain that all agreements between states are governed by public international law: Von Bar, *Private International Law* (trans. Gillespie, 1892), pp. 1122, 1123; De Louter, *Droit International Public* (1920), I, 468; Hatschek, *An Outline of International Law* (trans. Manning, 1930), p. 164; Jèze, Hague Academy, *Recueil des Cours* 53 (1935), 381, 383; Sir John Fischer Williams, *Chapters*, p. 259.

[2] Lauterpacht, *Private Law Sources and Analogies*, p. 5, while admitting that there may be inter-state transactions subject to private law, doubts whether the law to be applied is the municipal law of a particular country or "a universal private law, a kind of modern *jus gentium* based on comparative jurisprudence".

[3] Ruck, *Staatliches und Überstaatliches Handelsrecht, Festgabe für Carl Wieland* (Blâe, 1934), 320, 329.

[4] Lauterpacht, *loc. cit.* and p. 184, mentions the treaty between Columbia and Venezuela of July 20, 1925, League of Nations Treaty Series, XXXIX, 15, and the Treaty between Italy and Czechoslovakia, *ibidem*, XXXII, 251.

[5] State Papers, 112, 761; see also the agreement between Netherlands and Germany of May 11, 1920, State Papers 113, 1060, whereby Holland extended a credit of Fls.200,000,000 to Germany, and Germany undertook to deliver coal, "*force majeure* always excepted".

[6] For references, see Oppenheim (-Lauterpacht), I, 222, note 4; Van Praag, *Revue de Droit International et de Législation Comparée*, 1934, 652; 1935, 100; Stoupnitzky, *ibidem*, 1936, 801; Niboyet, *Revue Générale de Droit International Public*, 43 (1936), 525; Brookfield, *Journal of*

The available literature, however, seems to have overlooked some judicial pronouncements which, in so far as the law of this country is concerned, have in a large measure disposed of the matter without undue emphasis upon fine distinctions of formulation rather than substance. All the cases arose out of Indian events, the earlier ones resulting from the double character of the East India Company as a British corporation and a sovereign state. They proceeded on the basis of the familiar principle that a treaty between

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[*Note continued from previous page.*]

Comparative Legislation, 3rd series, XX (1938) 1; Fox, *American Journal of International Law*, 1941, 632.

[1] Chailley, *Traités Internationaux, Répertoire du Droit International* (Supplément, 1934), No. 10.

[2] See the very interesting remarks of Lord Shaw of Dunfermline in *Food Controller* v. *Cork*, [1923] A.C. 647, 667, 668 (although they do not relate to inter-state contracts).

[3] This seems to be the view of Heilborn, *Handbuch des Völkerrechts* (1912), I, 14. Although the important decision of the French Cour de Cassation of May 31, 1932, in Etat Français c. Carathéodory (*Rev. Crit.*, 1934, 909, with note by Niboyet) relates to a contract between a state and a foreign private person, it should be mentioned here, since it submits to private law contracts which "tant par leur nature que par la forme en laquelle ils ont été passés rentrent dans la catégorie des conventions de droit privé", and since it qualifies a transaction as a private law lease if "ce bail n'a procédé en rien d'un acte d'autorité de l'Etat Français, assimilable à la réquisition, au séquestre ou à toute autre mesure consécutive à l'état de guerre; qu'il ne relève pas que le bail ait contenu aucune stipulation dérogatoire au droit commun et de nature à lui imprimer un autre caractère que celui d'un véritable contrat civil".

[4] This seems to be the predominant view. See e.g., Bluntschli, *Le Droit International Codifié* (Paris, 1895), § 442 (note); Triepel, Hague Academy, *Recueil des Cours*, 1 (1923), 101; Liszt (-Fleischmann), *Völkerrecht*, 12th ed. (1925), p. 238, with further references and interesting material; Anzilotti, *Cours de Droit International* (1929), pp. 53 sqq., 341 sqq.; Lauterpacht, *Private Law Sources and Analogies*, p. 4; Ruck (above, p. 24, note 3), p. 329; see also the Permanent Court of International Justice in the *Case Concerning the Serbian and Brazilian Loans* (Series A, Nos. 14 and 15, p. 41): "Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country."

[5] Supplement to the *American Journal of International Law*, 1935, Part III, Draft Convention, Art. 1.

[6] *Ibidem*, pp. 693 sqq., 695.

sovereigns "is not a subject of private, municipal jurisdiction"[1] or, to put it in a less procedural way, that "the transactions of independent States between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make".[2] In order to justify the jurisdiction of the courts and the application of municipal law, therefore, the plaintiffs alleged that the transaction did not fall within the principle, since it involved not a treaty or an act of state, but a commercial contract. In *Nabob of the Carnatic* v. *East India Co.* the facts were as follows: the plaintiff, being indebted to the defendants, assigned to them by way of security certain districts of the Carnatic the revenues of which they were to receive and account for. By a later agreement the plaintiff was restored to his territories and the receipt of the revenues. By his bill the plaintiff alleged that the defendants had received moneys in excess of their debt, and claimed an account. While the first decision, rendered by Lord Thurlow on demurrer, turned mainly on questions of pleading,[3] at the trial Chief Baron Eyre said[4] (though he was not called upon to give a full judgment) that the transaction arose out of a treaty entered into with the defendants "not as subjects, but as a treaty between two sovereigns" and that therefore the dismissal of the action would have been inevitable.

The next case is *The Ex-Rajah of Coorg* v. *The East India Co.*[5] The Ex-Rajah had advanced money to the defendants and held their promissory notes for an aggregate amount of 857,840 rupees and interest. In 1834 the defendants declared war against the Rajah and seized his property except the notes which, being in the possession of his agents, could not be seized, but subsequently came into the defendants' possession. The Ex-Rajah claimed payment of the amount of the notes. The problem before the court was so concisely stated by Sir John Romilly that the material part of his judgment should be set out in full:[6]

> "The principal difficulty that I have felt in this case has arisen from the double character filled by the defendants, the East India Company. They were both a company of merchants trading to the East Indies, and a sovereign power, and so far as the Rajah of Coorg was concerned, a sovereign state wholly independent and at war with him. From hence it follows that the acts done by the defendants are frequently of an ambiguous character and that it becomes extremely difficult to ascertain whether any particular act is to be attributed to the exercise of the political power of a sovereign state, or to the functions of a company of merchants trading to the East Indies. If this case can be fairly represented to be an instance of a foreign power taking prisoner a private individual who is an enemy, and while so holding him, obtaining possession of documents which established his right to recover a debt due to him in his private capacity, then I am clear that the plaintiff is entitled to relief, and that the circumstance that the defendants constitute both the conquering power and the debtor, does not in any respect vary the position. But if the notes were the property of the plaintiff in his character of Rajah of Coorg and if they were taken possession of by the defendants in the exercise of

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[1] *Nabob of the Carnatic* v. *East India Company* (1793), 2 Ves.Jr. 56, 59.

[2] *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P.C.C. 22, 75.

[3] *Nabob of the Carnatic* v. *East India Co.* (1791), 1 Ves.Jr. 370.

[4] See above, note 1. See also *Moodolay* v. *Morton and East India Co.* (1785), 1 B.C.C. 468, which, though the plaintiffs were not sovereigns, is of some interest.

[5] (1860), 29 Beav. 300.

[6] Pp. 308, 309.

> their sovereign and political power, then I am equally clear that this Court cannot interfere."

The learned Master of the Rolls was satisfied that the notes belonged to the plaintiff "in his character of Rajah of Coorg and not in any private character apart from such office", that they were "part of the jura regalia", and that they were taken possession of by an act which had "no mercantile character", but which was done in the exercise of the defendants' sovereign and political power.

The last and most significant case on the question is the decision of the Privy Council in *Secretary of State* v. *Sardar Rustam Khan.*[1] In 1903 an agreement was made between the Khan of Kalat and an agent to the Governor-General in Baluchistan which was confirmed by the Viceroy and Governor-General in Council and provided that in consideration of certain rents the Khan of Kalat "makes over and cedes in perpetuity to the British Government the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction, and all other powers of administration, including all rights to levy dues and tolls". In 1906 the Government of India decided that there should be a settlement of the territory. For this purpose the lands were divided into three classes, one of which "was to be entered as government unoccupied lands". The plaintiffs claimed certain of these lands on the ground that they were comprised in their grants from the Khan of Kalat and that, therefore, the Government had no title to them. The Government's defence was that the treaty of 1903 gave them full sovereign rights over the territory, and that their acts done under the treaty were acts of state for which they could not be impleaded. Lord Atkin, who delivered the opinion of the Board, agreed that it was necessary to define the juristic effect of the treaty:[2]

> "According to the plaintiffs, it was merely what their counsel styled a 'commercial contract' intended only to effect a more convenient method of collecting revenue and granting powers only for that object. Their Lordships cannot take this view. It is opposed to the plain wording of the document and to the obvious construction when the treaty is regarded as a whole."

It is not necessary to review in detail Lord Atkin's reasoning or to refer at length to a considerable number[3] of other Indian decisions the essence of which is similar, though they did not arise out of contractual relations between two sovereigns, but involved the allegation that the plaintiff sovereign's property held by the defendants had been taken by them under colour of legal title in trust for the plaintiff rather than by way of seizure, i.e. an act of state. Enough has been said to show, firstly, that the courts have admitted the possibility of an inter-state transaction being a commercial contract subject to municipal law and amenable to municipal jurisdiction, and, secondly, that no single test has been evolved to distinguish the two categories. The nature of the transaction, the capacity in which the parties acted, the wording and contents of the agreement have been relied upon to determine its character.

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[1] [1941] A.C. 356.

[2] At p. 368.

[3] *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 13 Moo., P.C.C. 22; *Salaman* v. *Secretary of State*, [1906] 1 K.B. 613; *Secretary of State* v. *Bai Rajbai* (1915) L.R. 42, Indian Appeals 229; *Vajesingji Joravarsingji* v. *Secretary of State* (1924) L.R. 51, Indian Appeals 357.

It is thus perhaps permissible to suggest that, provided acts are in question which have clearly no "political" aspect or, to use the words of Grotius, which "a rege sed ut a quovis alio fiant", it is in reality the intention of the parties that determines the application of private law or of public international law. In the absence of express stipulation that intention is to be deduced by methods similar to those employed by the private international lawyer who ascertains the "proper law" of a contract: it depends on all the material circumstances of the case. Very clear evidence will have to be required before it can be assumed that sovereign states have contracted on the basis of private law,[1] particularly if it is remembered that by forming companies and doing their business through them states can so easily clarify their intention of securing the control of private law. On the other hand, it would probably not be justified to speak of a presumption that public international law applies.[2]

It is against this theoretical background that the grave legal problems should be viewed which are involved in certain aspects of the settlement of the war debts incurred between 1914 and 1918; they merit closer attention than they have so far received or can be given within the ambit of this paper.

By the British-American Agreement of June 18 and 19, 1923, which had been negotiated by Mr. Baldwin and is often referred to as the Baldwin Settlement,[3] Great Britain's indebtedness, agreed at $4,600,000,000, was to be funded into bonds. It was intended to issue to the United States 1,000 bonds of $4,600,000 each which, at the request of the United States, were to be exchanged for marketable obligations. The form of bond exhibited to the Agreement is, as Sir John Fischer Williams has remarked,[4] "in the style commonly adopted in lawyers' offices in London and New York for private 'business' arrangements":

"GOVERNMENT OF THE UNITED KINGDOM 62 YEAR 3–3½ PER CENT.
GOLD BOND.

"The Government of the United Kingdom, hereinafter called Great Britain, for value received, promises to pay to the United States of America, hereinafter called the United States, or order, on . . . the sum of $4,600,000. . . . All payments on account of principal and/or interest shall be made at the Treasury of the United States in Washington or, at the option of the Secretary of the Treasury of the United States, at the Federal Reserve Bank of New York. This bond is payable as to both principal and interest in gold coin of the United States of America of the present standard of weight and fineness or . . .

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[1] It should not be objected that the idea of sovereignty will usually prevent states from contracting on the basis of private law. States are known to submit readily to a legal system other than their own when contracting with private persons (above, p. 13, note 11); there is no reason why greater doctrinairism should be imputed to them when they contract with their equals about commercial matters.

[2] Cf. Triepel, Hague Academy, *Recueil des Cours* 1 (1923), 77, 102, 103: "les normes d'un droit privé interne déterminé sont applicable à des traités internationaux au cas seulement où les Etats ont indiqué ce droit par un accord spécial, soit en y renvoyant expressément, soit en faisant connaître, par des actes concluants, que ceci ou cela devra être apprécié d'après les règles d'un droit civil déterminé". The suggestion made in the text is supported by H. Kraus, Hague Academy, Recueil des Cours 1934 (IV) 327.

[3] Cmd. 1912; State Papers 126 (1927, I), 307. The full text of the agreement is reproduced by Sir John Fischer Williams, *Chapters*, pp. 361 sqq.

[4] *Op. cit.*, p. 348.

"The principal and interest of this bond shall be exempt from all British taxation, present or future, so long as it is in the beneficial ownership of the United States or of a person, firm, association or corporation neither resident nor ordinarily resident in the United Kingdom.

". . .

"This bond is issued by Great Britain pursuant to the Proposal, dated the 18th day of June, 1923, and to the Acceptance of Proposal, dated the 19th day of June, 1923.

"In Witness Whereof etc."

The same form of Agreement was adopted by the United States for the earlier settlement with Finland and the thirteen further settlements made over a period of three years.[1] In a standardized manner they set out the terms as to principal, interest, method of payment, marketing, notices, and so forth, and exhibited the form of bonds issued by the debtor state to the United States. These bonds, however, which are of predominant interest for present purposes, disclose a number of variations. Some of them are of minor importance,[2] but the significance of one of them may be considerable. The last clause of the Finnish bond reads:

"This bond is issued under an Agreement dated May 1, 1923, between Finland and the United States to which this bond is subject and to which reference is made for a further statement of its terms and conditions."

Substantially the same wording is to be found in the thirteen later bonds.

The Agreements which Great Britain concluded with eleven debtor states[3] closely followed the American pattern, although as to four of them this statement is only in the nature of a guess, since their text does not seem to have been published. Moreover, all the Agreements, except that with France, contain forms of bond. The bond given by Estonia is as follows:

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[1] *Finland*: May 1, 1923; *Hungary*: April 25, 1924; *Lithuania*: September 22, 1924; *Poland*: November 14, 1924; *Belgium*: August 18, 1925; *Latvia*: September 24, 1925; *Czechoslovakia*: October 13, 1925; *Estonia*: October 28, 1925; *Italy*: November 14, 1925; *Roumania*: December 4, 1925; *France*: April 29, 1926; *Yugoslavia*: May 3, 1926; *Germany*: concluded in pursuance of the Hague Conferences, 1929 and 1930, see the German publication, *Entwürfe zu den Gesetzen über die Haager Konferenz*, Part IV. All the above agreements, with the exception of the German agreement, are published by H. G. Moulton and L. Pasvolski, *World War Debt Settlements* (New York, 1926), pp. 241–374. The French settlement is also reproduced in State Papers 127 (1927, II), 511, and Lucien Petit, *Le Règlement des Dettes Inter-Alliées* (1919–22), Paris, 1932, p. 671. For the Italian and Lithuanian settlements see also Martens, *Nouveau Recueil Général*, 3e Série, XXV (1932) 30 and XXIX (1934) 658, respectively. For the Polish settlement see also Lucien Petit, *loc. cit.*, p. 561, who on p. 539 reproduces a "certificat de dette" as issued by France to the United States during the War. Already that certificate contained an undertaking to pay "aux Etats-Unis d'Amérique ou à leurs ayants droit".

[2] Exemption from taxation was extended to such beneficial owners of the bond as were corporations not organized under the laws of the debtor state. The words "for a further statement of its terms and conditions" in the clause of the Finnish bond mentioned in the text were omitted from the Belgian and all following bonds. The Roumanian, Italian, French, and Yugoslavian bonds read "to which Agreement" instead of merely "to which" in the last clause mentioned in the text. There are other variations of the clause dealing with payment which need not be indicated in detail.

[3] *Poland*: December 2, 1924 (not published, but mentioned *Survey of International Affairs*, 1925 (Supplement), p. 155); *Estonia*: July 24, 1925 (Martens, *Nouveau Recueil Général*, 3e Série, XVIII (1928) 169); *Latvia*: August 13, 1925 (not published, but mentioned *Survey*, *ibidem*); *Roumania*: October 19, 1925 (Cmd. 2990, State Papers 123 (1926, I), 562); *Czechoslovakia*: November 3, 1925 (not published, but mentioned *Survey, ibidem*); *Belgium*: December 31, 1925 (not published, but mentioned *Survey, ibidem*); *Italy*: January 27, 1926 (Cmd. 2580, State Papers 123 (1926, I), 526); *France*: July 12, 1926 (Cmd. 2692); *Portugal*: December 31, 1926 (Cmd. 2791, State Papers 123 (1926, I), 559); *Greece*: April 9, 1927 (Cmd. 2848, State Papers 126 (1927, I), 262); *Yugoslavia*: August 9, 1927 (Cmd. 2973, State Papers 126 (1927, I), 294).

> "The Government of the Republic of Estonia, for value received, promises to pay to the Government of Great Britain or order on the . . . the sum of . . . pounds sterling.
>
> "This bond is payable in pounds sterling at the Bank of England in London.
>
> "This bond will be paid without deduction for and will be exempt from any and all tax and/or charge, present and future, imposed by authority of the Government of Esthonia or its possessions or by any political or taxing authority within the Republic of Estonia."

In the case of Roumania the wording of the bond was different:

> "The Government of the Kingdom of Roumania, for value received, promises to pay to the Government of His Britannic Majesty or order on the . . . the sum of . . . pounds sterling at the Bank of England in London.
>
> "The payment due under this bond shall be exempt from all Roumanian taxation, present or future, so long as it is in the beneficial ownership of His Britannic Majesty's Government or of a person, firm, association, or corporation neither domiciled nor ordinarily resident in Roumania.
>
> "This bond is issued by the Government of the Kingdom of Roumania pursuant to the agreement of the 19th October, 1925, for the funding of the Roumanian war debt to Great Britain."

The bonds issued by Italy, Portugal, Greece, and Yugoslavia were *mutatis mutandis* in identical terms except that the second paragraph was worded more shortly:

> ". . .
>
> "The payment due under this bond shall be exempt from all Italian taxation, present or future.
>
> ". . ."

It is submitted that the differences between the various types of bond which have been pointed out have a bearing upon the problem of determining the legal system to which these bonds are subject.

The bond of the American standard type, such as the Finnish bond, is probably subject to public international law. This is the legal system governing the Agreement between creditor and debtor state. The bond is expressly made subject to the terms and conditions of the principal Agreement. In case of the German bond, in particular, there is no indication in the text that any person other than the United States was contemplated to become a creditor. The consequence is that if such bonds are assigned or (where they contain an order clause) indorsed in favour of a third party and if the successor in title is a private person,[1] public international law will have to be applied not only as between the holder and the debtor state, but also as between the holder and an indorser: if the United States indorses a British bond to the Guaranty Trust Company of New York, who indorses it in favour of the Royal Bank of Canada, the latter's rights against the former are not affected by British, American, or Canadian legislation, except in so far as the public policy of the forum has to be considered; since both under the Joint Resolution of Congress of 5 June 1933, and under the Canadian Gold

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[1] This was quite clearly contemplated, as appears from the clause granting exemption from taxation.

Clauses Act, 1937, a gold-clause obligation is declared to be contrary to public policy, neither an American nor a Canadian court will enforce such an obligation, but an English court could and would have to do so. The traditional view would probably lead to the conclusion that, so long as the bonds are owned by the creditor state, they are subject to public international law and that upon transfer to a private person they become subject to private law.[1] It is not a very attractive proposition to attribute such chameleon-like character to one and the same instrument. A deviation from traditional teaching is inevitable. Notwithstanding the order clause and the clause dealing with taxation a uniform submission under private law seems to be excluded by the incorporation of the principal agreement. On the other hand, a uniform submission under public international law will not terrify those who believe in the possibility of "internationalizing" a contract to which a state is a party. They will not even be deterred by the necessity for developing an international law of negotiable instruments to deal with problems to which the order clause of the bonds may give rise. They will assume this task rather than engage in the hair-splitting distinctions inevitably involved in any other method of approach.

The form of bond issued by Great Britain to the United States and signed by the majority of Great Britain's debtors, e.g., Roumania, perhaps is of a different character. These bonds are not expressed to be subject to the agreements from which they result. They refer to the funding agreements in pursuance of which they are issued. This, it may be argued, is not a contractual clause, but merely a statement made *informationis causa*, viz., for the purpose of indicating the debtor government's authority for the issue. This difference between what one may call the British and the American standard type of bond presumably was intentional. The parties apparently intended to sever all connection between the instrument and its political origin. Owing to their form and phraseology, to the order clause and the tax-exemption clause which so clearly envisages a transfer to private persons, all these bonds, of whatever type, have a commercial character. Unless the funding agreements were mentioned, all the bonds might be said to be subject to municipal law and, more particularly, to the law of the creditor state.[2] This conclusion may in fact be drawn where the bonds omit to incorporate the terms and conditions of the funding agreements.

These views, put forward with much doubt and hesitation, may perhaps be more confidently expressed in regard to the Estonian bond. This makes no mention at all of the funding agreement under which it is issued. It seems to be a purely commercial document governed by English law.[3]

IV

The interrelation of international and private law shown by the preceding discussion and the necessity for a revision of many an inveterate dogma are impressively demonstrated by the law of state guarantees. Within the framework of this paper no attempt can be made to treat it adequately.[1] But it entails in a singular fashion a combination of some of the features which have been alluded to above, and it is therefore fitting to devote to it a few words by way of postscript.

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[1] Jèze, "Les Défaillances d'Etat", Hague Academy, *Recueil des Cours*, 53 (1935), 381, 383, in fact says that if a state issues bonds *and* they reach the public, they become a commercial debt subject to private law, but if the second condition is missing, they remain political debts (whatever their origin or nature) subject to public international law.

[2] The connection with the creditor country's law is established by the fact that the bonds are payable in, and are expressed in the currency of, that country.

[3] The bond probably is a promissory note the "interpretation" of which would be subject to the law of the place where the contract is made: s. 72 (2) Bills of Exchange Act, 1882. This is the place of the first delivery: ss. 84, 21, 2, *ibidem.*

In its simple form a guarantee creates a tripartite relationship between creditor and debtor, creditor and guarantor, and guarantor and debtor. If both debtor and guarantor are states and if the creditor-debtor and creditor-guarantor relationship is subject to private law while the guarantor-debtor relationship is subject to public international law, there arises a curious situation in the event of the guarantor state being called upon to implement its guarantee: By way of subrogation (*cessio legis*) it acquires the creditor's claim against the debtor state. Since this claim is subject to private law and municipal courts have jurisdiction over it, the guarantor state would appear to have two entirely different rights against the debtor state, the one under private law, the other under the convention between the states, i.e. prima facie under public international law.

"Ceci donne à réfléchir," said Sir John Fischer Williams of this situation, and he continued:[2]

> "Il paraît un peu anormal lorsqu'il s'agit d'une guarantie que les droits des créanciers—des individus porteurs—soient considérés comme dépendant d'un droit (et d'un tribunal) autre que celui qui régit (ou est compétent pour juger) les rapports du gouvernement garant avec le gouvernement débiteur. Et cette anomalie s'accentue quand on se rend compte qu'au cas où le garant paie il a le droit de se faire subroger dans le droit du créancier vis-à-vis du débiteur. Ces droits, par le fait même de ce transfert, cesseraient-ils appartenir au régime national pour s'élever au domaine international?"

The implications of these questions have not always been fully realized by the draftsmen of international government loans.[3] The authors of the International Convention on Financial Assistance signed at Geneva in 1930[4] seem to have thought that the elimination of a direct claim by bondholders against guarantor states, the interposition of trustees and the control of the trustees by public international law,[5] would dispose of the difficulties.[6] Sir John Fischer Williams hoped that these problems would find a practical solution, and sought a somewhat academic refuge in the monistic character of law, "au moins pour les questions financières".[1] Neither method is quite satisfactory. So long as a comprehensive and radical reform of this field of law remains a hope for the future, there is no alternative but to approach the problems by a realistic manipulation of available tools. It is in this spirit that an attempt has here been made to furnish an initial contribution to a practical, though by no means easy, or ideal, solution.

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[1] See, in particular, Jèze, "La Guarantie des Emprunts Publics d'Etat", Hague Academy, *Recueil des Cours* 7 (1925), 155, and the literature there referred to. For guarantees in which Great Britain participated see, e.g., the Egyptian Guarantee (Convention of March 18, 1885, State Papers 76, 348), the Greek Guarantee (Convention of March, 1898, in Schedule to Greek Loan Act, 1898), the Austrian Guarantee referred to above, page 15, note 4.

[2] "La Convention pour l'Assistance Financière aux Etats victimes d'aggression", Hague Academy, *Recueil des Cours*, 34 (1930), 81, at pp. 137, 138.

[3] The Austrian loan, e.g., would appear to give rise to grave problems.

[4] Cmd. 3906; Hudson, *International Legislation*, V, No. 270. The Convention has never entered into force, but is interesting as a precedent for legal machinery.

[5] The guarantor states have to pay to the trustees (Art. 18). The amounts paid by the guarantor states constitute a debt due from the borrowing government to the trustees (Art. 17 (1) (c), 20 (1)). The liabilities between governments are to be settled through the intermediary of the trustees (Art. 17 (1) (d)) who have the right to settle all questions subject to appeal by any government to the Council of the League of Nations (Art. 22 and see Art. 27) which would no doubt have the right to obtain the opinion of the Permanent Court.

[6] The Convention pays little attention to the rights of the bondholders.

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[1] *Op. cit.*, pp. 138, 139.

CONSULAR IMMUNITIES

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THE object of this article is to inquire to what extent the two principal aspects of consular immunity—immunity of consular archives and the immunity of consuls, in respect of their official functions, from the civil and criminal jurisdiction of the receiving State—constitute such generally recognized rules of international law that they would be recognized in the English courts. The relevant rule of English law is that international law is part of the common law and that English law recognizes any privilege or immunity which international law requires.[1] This was so stated (*inter alia*) in the old cases of *Barbuit*[2] and *Triquet* v. *Bath*[3] and is still the law.

These two principal aspects of consular immunity might be fully expressed in the following terms:

(*a*) The archives and all other official documents and papers kept in a consulate shall at all times be inviolable and the local authorities may not under any pretext examine or detain any of these documents or papers. Correspondence between a consul and his Government shall be inviolable and the local authorities shall not examine or detain it. Consular officers and their employees shall be entitled to refuse requests from the courts or local authorities of the country where they reside to produce documents from their archives or other official papers or to give evidence relating to matters within the scope of their official duties. Such requests should, however, be complied with in the interests of justice if it is possible to do so without prejudicing the interests of the Government appointing them.

(*b*) Consular officers shall not be liable, in criminal or civil proceedings, in respect of acts performed in their official capacity and falling within the functions of consular officers under international law, unless their government requests or assents through its diplomatic representative to the proceedings. A consular officer may, however, be held liable in civil actions arising out of contracts concluded by him in which he did not expressly contract as agent for his Government and in which the other party looked to the consul personally for performance.

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[1] The relation, in England, between international law and municipal law is a subject on which authorities differ. It is discussed in Wheaton, 6th ed., by Keith, vol. I (1929), pp. 24–7, and in Oppenheim, 5th ed., by Lauterpacht, vol. I (1937), p. 36. Perhaps the best statement is in Wheaton at p. 27: "The true conclusion accordingly appears to be, as Westlake contended, that English Courts in matters within their normal jurisdiction as respects persons and places, must administer international law as well as the law of the land in its narrower sense, subject to the rules of that law which prevent the Crown divesting or modifying private rights by treaty, and forbid courts dealing with acts of State. In dealing with customary international law, the courts must clearly treat it as they do the common law, and must assist in developing its acknowledged principles in the same manner as they assist in developing those of the common law."

Lord Atkin in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160, says: "It must be always remembered that, so far as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of law and procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they treat it as incorporated into the domestic law so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." See on this statement, and generally, Lauterpacht, "Is International Law a Part of the Law of England?" in *Transactions of the Grotius Society*, vol. 25 (1939), pp. 51–88.

[2] Cases *tempore* Talbot 281.

[3] 3 Burr. 1478.

I

At the end of the eighteenth and the beginning of the nineteenth centuries the question was debated amongst the publicists and in the courts whether consuls were "public ministers" and as such entitled to all the privileges and immunities of diplomatic representatives, which include complete immunity from process in respect of official or private acts. After some divergence of opinion the view prevailed everywhere that, as consuls had no "representative character" (i.e. were not intermediaries through whom matters of State were discussed between Government and Government), they were not "public ministers" and therefore could not claim the general immunity and "exterritoriality" which attaches to diplomatic representatives, except in eastern countries where extraterritorial jurisdiction prevailed and where consuls have the same immunities from the local law as public ministers.[1]

For a short time after this it seems to have been concluded that since they could not claim privileges as "public ministers", they could not claim any privileges at all. The old English cases of *Heathfield* v. *Chilton*[2] and *Buvot* v. *Barbuit*[3] belong to this stage of development. Subsequently, the view prevailed that, though consuls were not "public ministers", they had a status of their own under international law. They were appointed by commissions from their own Sovereigns, and received "exequaturs" from the Sovereigns of the foreign country of their residence to perform important duties as State agents. They were charged with the protection of the nationals of their country and their interests in the foreign country and the furtherance of trade. They were the representatives of their States with regard to their merchant shipping abroad, charged with important functions with regard to internal discipline on the vessels, and had a special duty with regard to the property in the country of nationals who had died. It was consequently recognized that consuls enjoyed under international law such protection and immunity as is required for the performance of those duties. The United Kingdom has always been justly regarded as the absolute "low-water mark" in regard to consular status and privileges as compared with other countries, but the beginning of the view that consuls have some privileges is seen in the judgment of Lord Ellenborough in *Viveash* v. *Becker*,[4] where a resident merchant of London who was a consul of a foreign prince was held not to be entitled to immunity from arrest on mesne process in respect of a private trading debt. In this case Lord Ellenborough laid down that the consul enjoys a special protection under the law of nations, *including the right to the liberty and safety necessary for the discharge of his functions* and to safe conduct to enter and leave the country. In *Clarke* v. *Cretico*,[5] where the issue was the right of a consul to claim immunity from arrest, the court was at pains to decide on the ground that the man was no longer a consul rather than to deny any right for a consul to claim any privilege from arrest.

The scope of consular functions has very greatly increased during the last century, and now includes, in addition to those mentioned in the preceding paragraph, the issue of passports and travel documents to nationals and visas to foreigners, the registration of births, deaths, and marriages of nationals and other duties in connection with the nationality law of their countries; the celebration (in some countries) of marriage; the performance of the functions of a notary or commissioner for oaths; the issue of certificates with regard to merchandise. Their functions have always been such as involve much correspondence, with their Governments and with their diplomatic missions, of a secret and confidential character, and this tendency has increased in recent years owing to the fact that they report regularly and constantly for the information of their Governments on the political conditions in the country where they reside, e.g., movements of public opinion, signs of unrest, and the like.

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[1] For recent examples see the decisions of courts in Egypt in *Boehme* v. *Stross*, *Annual Digest*, 1933–4, Case No. 172, and *In re Assaud*, *ibid.*, Case No. 173.

[2] 4 Burr. 2015.

[3] Cases *t.* Talbot 281.

[4] (1814) 3 M. & S. 285.

[5] 1 Taun. 106.

Other countries, almost without exception, have concluded consular conventions setting out in some detail the functions of consuls and the privileges and immunities which they should enjoy. The provisions of these conventions are partly declaratory of international law and practice and partly give privileges and immunities exceeding those which are required under general international law. The fact that a given privilege or immunity appears in a convention affords no indication that it is or is not something which rests upon convention only. The most that can be said is that if a given privilege or immunity appears in almost every convention that is concluded, this is strong evidence, though not conclusive evidence, that this privilege or immunity is established under international law and the practice of nations.[1] In addition to various bilateral conventions a number of draft general conventions have been prepared which purport to be a codification of the general law and practice with regard to consuls. In particular, such drafts were prepared by the Institute of International Law in 1896;[2] by an Inter-American Committee of Jurists in 1927,[3] which resulted in the signature of a Pan-American Convention on Consular Agents at Havana in February 1928; and by the Harvard Law School Department of Research in International Law in 1932,[4] in connection with the League of Nations codification work. Except for the general Convention, signed in 1928 at Havana, which is in force as regards the United States and most of the Latin American countries,[5] these are drafts only. As evidence of what the general rules and practice of international law are, they are perhaps of a little more weight than the bilateral conventions, although it is clear that some at any rate of their provisions go beyond the minimum requirements of international law.

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[1] Wheaton, *op. cit.*, says at p. 14: "What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and customs of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point." Wheaton then quotes Madison as saying: "Treaties may be considered under several relations to the law of nations, according to the several questions to be decided by them. They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, first, a law between the parties themselves, and, next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations."

[2] *Annuaire de l'Institut de Droit International*, 15 (1896), p. 304.

[3] *American Journal of International Law*, 22 (1928), Special Supplement, p. 255.

[4] Cited here as *Harvard Research*.

[5] Hudson, *International Legislation*, vol. IV (1931), p. 2394.

II. *Immunity of Archives*[1]

The inviolability of the consul's archives is justly stated by the Harvard Draft (p. 322) to be "the most universally recognized of all consular immunities". It may also be said to be the one most obviously essential for the carrying out of consular duties. The necessity for it is hardly less than the necessity for the inviolability of the papers of a diplomatic mission, in view of the fact that consular papers frequently contain material whose secret and confidential character is practically as important as those of a legation. The British Government claims this right for British consulates abroad; e.g., the *British Consular Instructions*, 1921, Chapter I, paragraph 4, provide: "They [consuls] cannot be compelled to disclose correspondence which has passed between themselves and any Department of His Majesty's Government, Dominion and Colonial Governments and British diplomatic and consular representatives. All such correspondence must be regarded as privileged and consular officers should refuse to disclose it pending the receipt of a reply to a reference home."

Practically every consular convention, bilateral and multilateral, and every draft prepared by research committees, provides for this immunity and, though a few authors do not mention it (e.g., Oppenheim), nearly every author asserts it and no author denies it.[3] This immunity is so generally recognized that it is occasionally accorded even to consuls of unrecognized régimes who have not received an exequatur.[4] Tc.

Fauchille says that the rule is recognized by every country *except England*.[5] This statement as regards England, which is certainly incorrect so far as the practice of the United Kingdom Government is concerned, seems to rest on: (1) as tatement by W. B. Lawrence (the American author) that the consular archives of the United States consular officer at Manchester were in 1857 seized in execution of a private debt of the consul—an incident which Hall describes as fictitious;[1] and (2) a statement by Calvo that the archives of a consulate in London were seized as security for payment of taxes.[2] Clunet investigated this alleged incident, and on the authority of the Foreign Office and the Inland Revenue relegated the story to the domain of fiction.[3] When in 1920 the Petty Debt Court at Barbados, in the British West Indies, issued a process which had for its object the return to the plaintiff of a document which had been voluntarily filed in the consulate and which had become part of the official records, the United States Embassy in London, on instructions from the Department of State, brought the matter to the attention of the Foreign Office. The Department of State expressed the hope that "the British Government in this case as in others will recognize the inviolability of Consular Archives."[4] The Foreign Office expressed regret and stated that steps would be taken to prevent any recurrence of the incident.[5]

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[1] The principle of immunity of consular archives was recently affirmed in *Telkes* v. *Hungarian National Museum* (1942), 34 N.Y.S. (2d) 565; 178 Misc. 587, where the court held that that principle is not inconsistent with the duty of the consul to disclose what property belonging to a third party is in his possession.

[2] *Harvard Research*, p. 425.

[3] The following authors, *inter alia*, assert the right: Bluntschli, *Droit international codifié* (1894), para. 268; Phillimore, *Commentaries upon International Law*, vol. II, p. 275; Fiore, *Le Droit international codifié* (1911), para. 376; Stewart, *Consular Privileges* (1926), p. 35; Pradier-Fodéré, *Traité de Droit International*, vol. IV (1888), p. 700; Hall, *International Law* (8th ed., 1924), p. 375; Fauchille, *Traité de Droit international public*, vol. I, Part 3 (1926), p. 129, para. 760 (p. 136 in the 1935 edition); Anson, *Law of the Constitution*, vol. II, Part II, p. 102; Hyde, *International Law*, vol. 1 (1922), p. 799; Guerrero, *Dictionnaire diplomatique*, vol. I, p. 555; Bustamante, *Droit international public*, vol. I (1934), p. 410; Strupp, *Eléments du droit international public* (2nd ed., 1930), p. 229; Verdross, *Völkerrecht* (1936), p. 15; Martens, *Le guide diplomatique* (4th ed., 1854), vol. I, p. 251. The principle is asserted in regulations or official statements emanating from the following Governments: Austria, Decree of April 1928, § 32; Belgium, Regulations for the Congo, §§ 3 and 4; Bolivia, Regulations of July 1887, Article 98; Brazil, Decree of November 1851, Article 19; Honduras, Law of 1906, Article 35; Italy, Memorandum to the United States Ambassador of October 1930; Japan, Order of the Department of Justice of December 1923; Mexico, Law of 1859, Article 29; Salvador, Law of 1920, Articles 37 and 41; U.S.S.R., Regulations of January 1927; Venezuela, Decree of 1883.

[4] "Under generally accepted practice and principles of comity a consul may claim inviolability for the archives and official property of his office and their exemption from seizure or examination, and Department is of opinion that under existing circumstances the person acting as Mexican Consul General in New York, even though he has received no exequatur, should in practice be accorded such inviolability": Secretary Hughes to the Governor of New York, October 27, 1922 (Hackworth, *Digest of International Law*, vol. IV, p. 694).

[5] *Op. cit.* The same statement, "except England", is found in Guerrero's article in the *Dictionnaire diplomatique* and in Morton, *Les privilèges et les immunités diplomatiques* (1927), p. 114.

No case has been found where the point has arisen in any English court. In the case of *Kessler* v. *Best*[6] a Federal Court of the United States upheld the right of a German consul to refuse to answer questions about documents in his archives, and on his application (supported by the Minister) struck out certain answers to interrogatories which he had already given relating to these documents, on the ground that the privilege against disclosure belonged not to the consul but to the German Government. It would appear that there can be no doubt that consular archives and official papers are inviolable under international law; that the international rule is so clear that the English courts would recognize it. It is obvious that if the archives cannot be produced the consul cannot be compelled to testify orally to their contents or to testify orally to official acts or communications merely because they have not (yet) actually been recorded in writing.[7]

III. *Immunity from Jurisdiction in Respect of Official Functions*

Our formulation of the second principal aspect of consular immunity provides for immunity from process in respect of acts performed by a consul in the course of his official duties in the sense that, if a proceeding is brought and the court finds that it is based on an official act "falling within the functions of the consul under international law", this finding negatives liability. The question for consideration is whether there is authority for the existence of a rule of general international law to this effect sufficiently conclusive to enable us to assert that English courts would recognize the rule in the absence of legislation.

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[1] *International Law* (3rd ed., 1890), p. 319, n. 1.

[2] *Le Droit international théorique et pratique* (5th ed., 1896), section 1395.

[3] *Journal de droit international privé*, 1888, p. 66. Apart from the inviolability of archives, they were certainly not the private property of the consul, and it is difficult to see how they could be seized to satisfy his personal debts.

[4] Hackworth, *op. cit.*, vol. IV, p. 723.

[5] *Ibid.* In 1913 the United States District Court in Philadelphia issued a decree placing the Greek consul under an injunction to hold certain papers, relating to his appointment by the Holy Synod of the Church of Greece as pastor of the community, in safe keeping until the further order of the court. Following upon the information of the Greek Chargé d'Affaires the Department of State, in a communication addressed to the Attorney General, expressed the view that the action against the consul for the delivery of the papers might be found to be at variance both with the Consular Convention with Greece as well as with "the principles of international law relative to the immunity of Consular archives". The court thereupon revoked the injunction: *ibid.*

[6] (1903), 121 Fed. Rep. 439.

[7] For a somewhat inconclusive case in which an Argentine Court fined the Spanish Consul General for refusing to comply with the order of the court to supply information from the files of the Consulate in proceedings concerning the repatriation of a Spanish subject see *In re del Valle Inclán*, *Annual Digest*, 1941–2. The Court of Appeal substituted a warning for the fine.

The authority which has to be considered on the question of the existence of this rule in international law is:

(*a*) official statements by Governments and in laws and regulations issued by them and, subsidiarily, the provisions of conventions concluded by them;
(*b*) the decisions of courts in proceedings brought against consuls recognizing or denying the international rule;
(*c*) the views expressed by writers, including draft conventions prepared by unofficial bodies of international lawyers.

(*a*) *Official Statements by Governments and Laws and Regulations Issued by Them. Provisions of Conventions.* There are many official statements and regulations issued by Governments, which state generally that consuls cannot claim diplomatic immunity and are subject to the jurisdiction of the local courts and *make no special reference to process relating to acts performed in their official capacity.*[1] No statements or regulations have been found which deny the existence of immunity specifically in regard to this class of acts. The immunity from process in respect of official acts is specifically recognized in the following official statements and regulations:

Denmark. Resolution of April 25, 1821:

"Foreign consuls (whether of Danish or other nationality) do not come under the jurisdiction of the country so far as their consular affairs are concerned."[2]

Italy. Memorandum from the Italian Government to the United States Ambassador of October 1930:

"As regards the prerogatives of consuls, it is to be noted that they are more restricted than those of diplomats. . . . Immunity from the local jurisdiction is limited to acts performed by the consuls in the exercise of their functions, aside from special conventions."[3]

Sweden. Memorandum from the Swedish Government to the American Legation of April 1930:

"Through the application of international usage, as well as by virtue of various treaties, according to consuls under the conditions of reciprocity the benefit of the most-favoured-nation treatment, the Swedish authorities would probably recognize for them exemption from jurisdiction for all acts attaching to their quality of public agents."[4]

U.S.S.R. Regulations of January 14, 1927:

"Article 11. The consular representatives of foreign States enjoy on basis of reciprocity the rights and privileges attached to their functions in conformity with the rules of international law. In particular the consular representatives—

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[1] The negative evidence of omissions to mention is never very strong. In this case it may, moreover, be explained in some instances on the ground discussed below (p. 45).

[2] Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933), p. 411.

[3] *Ibid.*, p. 714.

[4] *Ibid.*, p. 1156. It goes on to say that there have been no judicial decisions in Sweden on the point, as the Ministry for Foreign Affairs has been generally able to arrange settlements

"(*a*) . . .

"(*b*) . . .

"(*c*) are not subject to the jurisdiction of the judicial institutions of the U.S.S.R. and of the Federated Republic because of offences committed in the discharge of their office."[1]

Switzerland. A letter from the Swiss Federal Political Department to the judge of a court of the Canton of Berne, who had asked whether it was permissible to attach a bond deposited with a foreign consulate, gives the following ruling:

"In principle consuls are subject to the jurisdiction of the receiving State *except with regard to acts done in the exercise of their official duties and within the sphere of their authority.* A seizure or attachment of property in the possession of a consul is permissible as in the case of any other third party, unless the property in question is held by the consul in the exercise of his internationally recognized official capacity or unless the consulate as such is the debtor.

"This distinction may entail certain difficulties. If, as may be assumed, the bond is in the office of the consulate, the attachment cannot be effected under the provisions of Articles 91–109 of the Federal Execution and Bankruptcy Act. The consular archives enjoy immunity not only under general rules of international law, but also under positive provisions of particular conventions to which Switzerland is a party. For this reason representatives of the authorities of the receiving State are not allowed access to the consular archives without the consent of the principal officer in charge. Accordingly, a writ of execution against a consulate can never be issued in the usual form; in practice it will be couched in the form of a simple notice of the writ of attachment, thus being in substance a request for judicial assistance."[2]

The United States of America. In volume IV of Hackworth's *Digest of International Law* there will be found a number of pronouncements of the Department of Justice and of its Legal Adviser to the effect that while in principle consuls are subject to local jurisdiction they are immune from it in matters relating to their official functions.[3]

United Kingdom. No official pronouncement by the Government of the United Kingdom has been found, but Stewart[4] records that in 1910, when two British seamen brought an action against a British consular officer in Cuba on a set of facts arising out of an official act by the consul, the Government of the United Kingdom took the matter up with the Cuban Government; that the Cuban Government transmitted the British Minister's Note to the Cuban Supreme Court and the judgment of the Supreme Court admitted the principle that "in conformity with the principles of international law consular officers are not subject to the jurisdiction of the courts of the countries to which they are accredited in respect of acts performed in the exercise of their official character and in the name of the Government they represent".

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[1] Feller and Hudson, *op. cit.*, p. 1220.

[2] *Annual Digest of Public International Law Cases*, 1931–2, p. 337.

[3] *Op. cit.*, pp. 726 et seq. Thus in 1909 the United States Department of State took the position that "consular officers in Germany are not exempt from civil process and . . . suit can be brought against them in unofficial matters. . . ." (*Ibid.*, p. 727.)

In his Instructions to the Minister in Venezuela Secretary of State Lansing said, on July 15, 1915: "In the absence of treaty provisions between the United States and Venezuela defining the rights, privileges and immunities of consular officers, such officers would appear, under the generally accepted rules of international law, to be entitled only to those rights, privileges and immunities necessarily incident to the proper performance of their duties or supported by long-established custom or the particular laws of the place, and that otherwise they are subject to the laws of the land precisely as other persons irrespective of the question of their nationality." (*Ibid.*, p. 699.)

[4] *Consular Privileges and Immunities* (1926), p. 151.

In addition, the laws and regulations of the following countries direct their consuls to claim in foreign countries as essential for the discharge of their functions ". . . the freedom of those acts appropriate to their consular character": Salvador (Article 93 of the organic law for diplomatic and consular service); Bolivia (Regulation, 1887, Article 21); Chile (Regulations, 1915, Article 113); Costa Rica (Regulations, 1888, Article 27); Honduras (Law, Article 40); Liberia (Regulations, Article 113); Uruguay (Regulations, 1917, Article 57); Dominica (Law, 1887, Article 18); Ecuador (Regulations, 1870, Article 17).

Nearly all modern consular conventions contain an express provision on the following lines: "Consuls shall not be subject to the jurisdiction of the State in which they reside officially as regards the carrying out of their official duties": Article X of the Convention of March 1925 between Germany and Estonia. (See also Article 4 of the Convention of March 1924 between Italy and Czechoslovakia; Article 5 of the Convention of July 1924 between the U.S.S.R. and Poland; Article 4 of the Convention of December 1925 between France and Poland. There are innumerable other instances.)

Modern conventions generally also contain another provision providing for the immunity of consuls from arrest in *all* civil actions and from preventative detention except for very serious crimes (e.g., Article 4 of the Convention of December 1925 between France and Poland). The old consular conventions generally contain more or less extensive provisions with regard to immunity from arrest, but no provision dealing with immunity in respect of official acts (viz., the Convention of 1853 between the United States and France). However, the applicability of the rule of immunity for official acts *as a rule of general international law* has been recognized by the French courts in relation to a United States consul in France.[1]

The Pan-American Convention signed at Havana in February 1928, to which the United States is a party,[2] provides in Article 16:

> 'Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority. In case a private individual deems himself injured by the consul's actions he must submit his complaint to the Government, which, if it considers the claim to be relevant, shall make it valid through the diplomatic channel."

(*b*) *Judicial Decisions.* There are very many judicial decisions given by courts in several countries in the case of proceedings brought against consuls in respect of private acts, which state that consuls have no immunity from process and are in the same position as regards process as private persons and make no reference to any special rule as regards official acts. These are particularly numerous in the United States, where there is a considerable number of reported cases dealing with proceedings against consuls, in view of the provision in the Constitution and in certain statutes of the United States giving to the Federal courts exclusive jurisdiction in respect of all kinds of proceedings against consuls and to the Supreme Court a concurrent original jurisdiction. On the other hand, no reported case has been found in the courts of any country in which the process has been based on an official act and in which the rule that there is immunity for official acts has been denied. There are several cases in which this rule has been expressly recognized.

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[1] See *Zizianoff* v. *Kahn and Bigelow, Annual Digest,* 1927–8, Case No. 266.

[2] Hudson, *International Legislation,* vol. IV, p. 2394.

In the case of *R.* v. *Ahlers*[1] the Court of Criminal Appeal in England quashed the conviction of the German consul at Sunderland, a British subject, for high treason for assisting German nationals of military age to return to Germany at the beginning of the war on the ground that the judge should have directed the jury to consider whether Ahlers acted in bona-fide belief that it was his duty as consul to assist Germans to return to Germany. Though no doubt this decision is based on the principle that the jury's finding must be directed to the question of *mens rea* and no reference to any rule of international law was made, this decision is certainly not inconsistent with the recognition—in a very strong case—of the rule of immunity for consular acts and in fact applies this rule. Apart from this case, no reported decision has been found in which a consul has been held liable in England for any official act, and no decision where a consul has been sued, pleaded immunity and succeeded.

In the Canadian case of *Maas* v. *Seelheim*[2] the consul did not plead immunity; he only pleaded qualified privilege in respect of a defamatory statement made in the course of his official duties, and succeeded. Similarly, in *Campbell* v. *Cour des Sessions générales de la Paix*,[3] a Quebec case, the consul only pleaded complete immunity from the jurisdiction, which was denied, and did not plead that he had acted in the course of his official duties—it is doubtful if this could have been sustained on the facts. In two other Quebec cases no question of official duties arose.[4]

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[1] [1915] 1 K.B. 616.

[2] (1936), 4 *D.L.R.* 267. In this case the plaintiff brought an action for libel and slander in the Dominions courts of Manitoba against the German consul in respect of a report written by the defendant about the plaintiff, a German national, to the plaintiff's superior officer in a German shipping line. The statements were *prima facie* defamatory, but the defendant pleaded qualified privilege on the ground that the words were written by him *bona fide* and without malice in the course of his official duties as consul, and the action was dismissed on this ground. The defendant did not apparently plead immunity from the jurisdiction because the matter arose out of his official duties and there is no pronouncement by the court on this point.

[3] 49 *Quebec Law Reports, King's Bench* 65. In this case Campbell appealed to the Court of King's Bench in Quebec against a judgment of an inferior court refusing to dismiss a prosecution against him for taking money for assisting certain persons to enter the United States by means of false nationality declarations. He claimed that it should be dismissed because he was a consul and as such possessed immunity. The report merely records that the Court of King's Bench dismissed the appeal because "under the English doctrine applied in Canada, consuls are not diplomatic representatives and do not enjoy personal immunity". The report does not state of what country he was a consul, whether he was *de carrière* or not and whether his Government had acquiesced in or even asked for the prosecution. He *may* have been a United States consul, and in view of the facts, the United States Government may well have requested the prosecution. The question whether the facts complained of could be said to be within his official duties was not raised.

[4] *Maluquer* v. *R.* (1924), *Quebec Reports, King's Bench* 1. In this case Maluquer, Spanish consul at Montreal, was convicted of conspiracy with two other persons to defraud the revenue by importing into Canada goods on false documents to avoid payment of customs duty, and

In the United States no decisions have been found in which, apart from convention, either (1) a consul has pleaded immunity for official acts and the immunity has been denied in principle, as opposed to cases where it was held on the facts that the acts were not official; or (2) a consul has obtained the dismissal of the action on the ground that the case arose out of official duties. But the principle that the court should not accept jurisdiction where the case does arise out of official acts seems to be recognized in *Lyders* v. *Lund*,[1] in *Patch* v. *Marshal*,[2] (indirectly) in *Castro*

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for importing narcotic drugs. The house where his consulate was situated was searched under a warrant issued by the court and a number of letters and papers seized. Maluquer pleaded not guilty and opted for speedy trial before a magistrate. He appealed from his conviction on various grounds, including the ground that search and seizure of papers at the consulate was illegal under international law. It was held that even if search was illegal, it would not render the trial void; that the consul possessed no personal immunity from suit; that his official residence enjoyed no inviolability from search except as regards the archives and official papers (citing Hall's *International Law*). No question of the act being done in the course of official duties was or could have been raised here.

Leonard v. *Premio Real* (1885), 11 *Quebec Law Reports* 128. This was an action for a private debt against the Spanish consul. Immunity was claimed on the ground that he was not only Spanish consul but the only representative of Spain in Canada. Immunity was denied on the ground that he had not proved that he was entrusted with more than consular duties.

[1] Decided by the United States, District Court, N.D. California, on April 12, 1929, as reported in *Annual Digest*, 1929–30, Case No. 321. This was an action in equity brought by an American citizen against Lund "as consul of Denmark at San Francisco", seeking an accounting for disbursements and fees as attorney to the consulate and a sale of certain assets assigned to plaintiff as security. The defendant appeared specially, "as consul", and moved to dismiss the action on the ground that it was a suit against the consul of Denmark in his official capacity. It was contended that this amounted to an action against the Government which he represented. It was held that the motion to dismiss should be denied. The suit was not against the Government. The Court said: "In actions against the officials of a foreign State not clothed with diplomatic immunity, it can be said that suits based upon official authorized acts performed within the scope of their duties on behalf of the foreign State, and for which the foreign State will have to respond directly or indirectly in the event of a judgment are actions against the foreign State. Acts of such officials, beyond the scope of their authority and in connexion with their private business, cannot be regarded as acts of the foreign State, and the official may be sued on account of any such acts. . . . The Kingdom of Denmark is not joined as a defendant in the suit, nor has it been made clear that, as between that kingdom and the defendant consul, such transactions as those sued upon are not considered as the personal acts and liabilities of the consul in the event of suits by third parties." See also, to the same effect, *Petersen* v. *Lyders*, decided in 1934 by the District Court of Appeal of California (139 Cal. App. 303; *Annual Digest*, 1933–4, Case No. 390).

[2] (1853), 1 Curt 452. This was an action for damages by a member of the crew, a United States citizen, against the captain of a British ship, a British subject domiciled in the United States, arising out of events connected with a voyage from Boston to Cuba and back. The District Court decided in favour of the plaintiff. The defendant appealed. The British consul intervened and contended that the United States had no jurisdiction because the investigation of the claim would call in question official acts and the conduct of the consul in regard to British subjects. The intervention was dismissed on the following grounds: (1) If intervention was successful the appeal would be dismissed and the decision against the captain given by the District Court would stand; (2) It would be a denial of justice to the plaintiff for United States courts to hold that they had no jurisdiction against this British captain who was domiciled in the United States; (3) "It is true that this court should not call in question a British consul for his official acts respecting crew of British vessel in a foreign port. (*cf. Chester* v. *Benner*, Fed. Cases 2660, where it was stated that in suits between master and crew an imprisonment by order of a consul must be assumed to have been necessary.) It is correctly stated in the protest that he is responsible solely to his own Government or if to individuals such responsibility aries out of the law of his own country, which this court would not undertake to administer. But it does not follow that the conduct of the master of the vessel in procuring official intervention of an American citizen by imprisonment in a foreign jail is not here investigated."

v. *De Uriate*,[1] in *Commonwealth* v. *di Silvestro*,[2] and in *Byoir* v. *Tsune-Chi Yu*.[3]

In France the rule that under international law and apart from convention a French court has no jurisdiction to entertain proceedings against a foreign consul in respect of official acts seems to be firmly established and regularly applied, as may be seen from the following cases: *Murphy* v. *Lee Jortin*,[4]

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[1] (1883), 16 Fed. Rep. 93. This was an action against the Consul-General for Spain, for false imprisonment and malicious prosecution in connection with extradition proceedings for the extradition of the plaintiff which the consul had instituted in his official capacity. The action was dismissed, but on the finding that there was no malice and that probable cause must be presumed.

[2] 31 Pa. Supr. Ct. 537. In this case it was held that United States courts have no concern in alleged abuses by foreign consuls in charging fees or in expending money entrusted to them by foreign Governments.

[3] Decided by the United States Circuit Court of Appeals, Second Circuit, (1940) 112 F 2d. 885; *Annual Digest*, 1941–2. In this case the plaintiff alleged that the Chinese Government had become indebted to him for a balance of $83,056, and that after the Chinese Government had sent to the defendant, the Chinese Consul-General at New York City, the sum of $22,000 to the plaintiff's account "and in trust to pay the same over to the plaintiff on account of the debt", the defendant converted and appropriated the sum received. The District Court granted the motion of the defendant to dismiss the action on the ground that under the action it would be necessary to adjudicate upon the plaintiff's claim against the Chinese Government and that the action could not be maintained against the defendant alone. The Circuit Court of Appeals reversed the judgement, holding that the Chinese Government was not a necessary party to the suit, and that the case was one only between the plaintiff and the defendant. Apparently, though the report is not clear on the subject, the allegation was that the defendant converted the money for his own purposes. See also *Landley* v. *Republic of Panama* (31 F. Supp. 230; *Annual Digest*, 1938–40, Case No. 175), where the District Court for the Southern District of New York held that although the consul was "sued individually as well as in his official capacity, it seems clear from an analysis of the complaint that the action is directed against him based upon the duties performed by him as Consul-General of his country." The court declined jurisdiction. And see *Auer* v. *Costa*, where the Massachusetts District Court held that an account standing in the consul's name but in fact belonging to his Government could not be attached. (23 F. Supp. 22; *Annual Digest*, 1938–40, Case No. 174.)

[4] Clunet, *Journal du Droit international*, 1900, pp. 130, 958. The defendant, British Vice-Consul at Dieppe, was summoned before the "tribunal correctionnel" at Dieppe for defamation because he told the plaintiff in the office of the vice-consulate, before three witnesses, that he was a drunkard. The remark was made because the plaintiff complained that the defendant had not assisted the plaintiff in connection with his arrest by the local authorities. It was held (1) that the remarks were made by the defendant in the performance of his official functions; (2) that consuls, though they do not possess the extraterritoriality and exemption from jurisdiction of diplomats, and are subject in France to the criminal law and the jurisdiction of the courts, are "public officers of a foreign sovereign" invested with the function of defending the interests of their nationals, and consequently possess a personal immunity "tant qu'ils restent dans les limites de leurs fonctions officielles et que l'ordre public n'est pas compromis." This is not an exemption from jurisdiction, but an essential immunity resulting from the institution of consulates and required by rules of international comity; consuls could not perform their functions with the necessary independence if they could be proceeded against by their nations in respect of matters coming within the sphere of their official functions; (3) that for the reasons given above the court must declare itself incompetent to decide whether the statements made by the defendant were defamatory or not. The editorial note in Clunet approves the decision and refers to Lehr, *Agents diplomatiques et consulaires*, n. 128, 64 et seq. The above decison was confirmed by the Court of Appeal at Rouen on precisely the same grounds (Clunet, 1900, p. 858). Murphy brought a further action against Lee Jortin for defamation because the latter had written a letter to *The Times* (reproduced in a local Dieppe paper), in which he defended his action in refusing to assist Murphy, and stated *inter alia* that Murphy had claimed untruly to be an officer in the army, had been arrested for breaking a street lamp and brandishing a revolver, and had falsely stated that his wife was a sister of the wife of the British Ambassador at Paris. It was held by the Dieppe tribunal (1) that this letter was not written by the defendant in his official capacity, and therefore the tribunal was competent; (2) that the statements were made without malice and with intention to serve the public interest and to defend his reputation. This judgment was confirmed by the Court of Appeal at Rouen.

Zizianoff v. *Kahn and Bigelow*,[1] *Khangi* v. *Guthman*,[2] *Faucompré* v. *Polish Consul-General*,[3] and *Wemberg* v. *Hellevig*.[4]

The position seems to be the same in the courts of Italy—*Little* v. *Riccio and Fischer*[5] and *Mazzucchi* v. *American Consulate*.[6]

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[1] *Annual Digest*, 1927–8, Case No. 266. This was a prosecution for defamation against Bigelow, the director of the passport section of the United States Consulate at Paris, because, after refusing a visa to Zizianoff, he issued to journalists information defamatory of Zizianoff. Bigelow claimed that there was no jurisdiction on two alternative grounds: (1) on the basis of a consular treaty (not relevant); and (2) on the ground that the act was done in the course of his official duties and that under a rule of international law there was no jurisdiction. The court held as to (2) that the rule is admitted, but that the act complained of was distinct from the official act of refusing a visa, and not in the course of official duties.

[2] Clunet, vol. 34, p. 980.

[3] Decided by the Civil Tribunal of Lille on May 7, 1932, *Annual Digest*, 1931–2, Case No. 183. In this case an action was brought before the " Président des référés" (a summary jurisdiction concerned mainly with decreeing conservatory measures) against the Polish Consul-General, in his capacity as representative of the Polish Government, with regard to the lease of the consular premises. The consul invoked jurisdictional immunity. It was held that the French courts had no jurisdiction. "A foreign State is in general immune from the jurisdiction of another State." And see the following Note to this case in the *Annual Digest*: "This decision conforms with other French decisions on the subject. Before 1840 the French courts refused to grant immunity from jurisdiction to consular agents, but from 1840 onwards this attitude has been reversed (see the decisions mentioned in Challine, *Le droit international public dans la jurisprudence française de* 1789 *à* 1848 (1934), pp. 208–22). Contemporary jurisprudence has confirmed this change: see the decision of the Conseil d'Etat of the 22nd March, 1929, in *Ministre des finances* v. *Héritiers* X (*Annual Digest*, 1929–30, Case No. 213); and the decision of the Civil Tribunal of the Seine of the 30th October, 1929 (*Dalloz hebdomadaire*, 1930, p. 15). It will be noted that the immunity granted to consuls applies only to their official activities, as distinguished from purely personal acts."

[4] Decided by the Civil Tribunal of Marseilles on December 28, 1912. In this case the plaintiffs sued the defendant, the German consul at Marseilles, because they had been dismissed from employment at the German Seamen's Mission at Marseilles without notice. The consul acted as president and manager of the mission on the orders of the German Government and in his official capacity. The Tribunal held that it had no jurisdiction because, although the consul possessed no complete immunity from the jurisdiction of a French court, the act complained of was one performed by the consul in the course of his official duties and the French courts cannot assume jurisdiction over acts done by consuls on the orders of their Government. In a case in March 1913 brought against the consul of Colombia at Marseilles, the same Tribunal accepted jurisdiction, expressly stating as the ground of its doing so that the cause of action had nothing to do with his official functions.

[5] (1934) Clunet, p. 1071; *Annual Digest*, 1933–4, Case No. 68. In this case the Court of Appeal at Naples declared itself incompetent to entertain an action arising out of a contract of employment relating to a cemetery maintained for the burial of British subjects at Naples and owned by His Majesty's Government, against the British Consul-General, on the ground that the Consul-General represented his country in concluding this contract, and that in the arrangements made for the maintenance of the cemetery His Majesty's Government were exercising "un droit public". In Italy the immunity of foreign States from the jurisdiction is only recognized as regards their "public acts", as opposed to acts performed by states which are considered not to be of an essentially public character, viz., commercial contracts, etc.

[6] Decided by the Court of Appeal of Naples on April 7, 1931, as reported in *Annual Digest*, 1931–2, Case No. 186. In this case the plaintiff, who had been employed at the American Consulate at Naples, was dismissed in August 1930. On October 30 he brought an action before the Court of Naples asking for compensation for wrongful dismissal. The court dismissed the action on account of lack of jurisdiction. On appeal it was held that the court had no jurisdiction. "Consuls do not possess the true and proper quality of representing the State in its international political relations; neither are they diplomatic agents. Nevertheless, in fulfilling their mission and in exercising the powers belonging to them they must be considered as official agents of the Governments by whom they are appointed. It follows that, if consuls enter into relations with private persons in order to carry out duties which appertain to the political activity of the State which they represent, no action in respect of such relations can be brought before the courts since a foreign State cannot, in the exercise of its political functions, be subjected to the jurisdiction of another State without suffering a denial of its sovereignty. If, on the other hand, consuls engage in private activities, then they assume the character of foreign private persons, and as such are admitted to the enjoyment of the civil rights which the law confers upon citizens. In such a case consuls are subject to the jurisdiction of the Italian courts. . . ."

The *Lalezar* case[1] is an instance of the rule being recognized by the Persian courts, and a similar instance in Cuba is found in the judgment of the Supreme Court of Cuba in 1910.[2] The *Consular Premises* (*Greece*) *Case* may be an instance of the recognition of the rule by the Greek courts—but the *ratio decidendi* may in that case be the immunity of the consul's State.[3] It is clear that the rule is also recognized by the Swiss courts.[4] It appears also that the rule was recognized by the Egyptian Mixed Courts as regards consuls, who could *not* claim, as some consuls in Egypt could, the superior immunities of diplomatic representatives.[5]

It will thus be seen that on the basis of official governmental statements and regulations and judicial decisions alone (and without relying on the opinions of writers), clear evidence of the recognition of the rule of immunity for official consular acts has been produced in the case of nineteen countries, viz., Denmark, Italy, Sweden, the U.S.S.R., Switzerland, United States of America, France, Persia, Cuba, Salvador, Chile, Costa Rica, Bolivia, Honduras, Liberia, Uruguay, Dominica, Ecuador and Egypt, and that there is no positive evidence of non-recognition in the case of other countries.

(*c*) *Opinions of Writers and Unofficial Drafts.* With regard to the opinions of writers on international law, many of them merely state that consuls, unlike diplomatic officers, possess no immunity from process, and make no reference to any special rule with regard to proceedings relating to their official acts, though (in some cases) stating that consuls have some special immunities. Into this class fall Phillimore,[6] F. de Martens,[7] Féraud-Giraud,[8] Hannis Taylor,[9] Oppenheim,[10] Moore,[11] Hyde,[12] Pitt Cobbett,[13] Wheaton,[14] Strupp,[15] and Pallieri.[16] It is thought that the weight to be attached to the purely negative evidence of omission of any reference to this point must be less than that to be attached to positive statements, especially as in all these works the subject of consuls is treated shortly in a chapter or part of a chapter in a general treatise. Moreover, in so far as the immunity of consuls in respect of official acts is regarded, as clearly some authors and judicial decisions regard it, as flowing from the immunity of their Governments rather than as a consular immunity, the omission to mention it in connection with the discussion of consuls has still less significance. One author only—Travers[1]—a writer on international penal law, expresses a definite opinion against the rule, an opinion which he admits to be contrary to French jurisprudence. The following twenty authors, nationals of different countries, refer to exemption in respect of official duties in terms which imply—though with varying degrees of emphasis and confidence—that they consider it to be established law, viz.: C. de Martens,[2] Fiore,[3] Pradier-Fodéré,[4] Halleck,[5] Rivier[6] (in favour of immunity from criminal process only), Calvo,[7] von Ullmann,[8] Stowell,[9] de Louter,[10] Hall,[11] Fenwick,[12] Fauchille,[13] Stewart,[14] Lapradelle and Niboyet,[15] Hezking,[16] Puente,[17], de Paepe,[18] François,[19] Fedozzi[20] and Verdross[21] (criminal process only). In addition, opinions in favour of the existence of this immunity were expressed by the League of Nations Preparatory Codification Committee of 1927;[22] by the Harvard Draft of 1932;[23] by the Inter-American Committee of Jurists in 1927;[24] and by the Institute of International Law in 1896.[25] In effect, every author, or committee of experts, who treats the question of consuls in any detail expresses views in favour of the existence of the rule.

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[1] *Lalezar* v. *His Britannic Majesty's Consul at Kermanshah* (1933). This was an action against the consul for damages for delay in refunding a sum of money paid. It was held that no action lies against a consul in respect of a measure taken in discharge of official duties and that the matter must be taken up with the consul's Government through the diplomatic channel.

[2] Published in *Gaceta Oficial*, No. 128, p. 5623.

[3] Decided by the Court of Athens in 1931.

[4] See above, p. 40.

[5] *Ahmed Bey El Saadani* v. *El Sayed Mohamed Dessouki*, decided by the Egyptian Mixed Court of Appeal on March 7, 1935: *Bulletin de Jurisprudence et Législation égyptiennes*, 1934–5, p. 192; *Boehme* v. *Stross*, decided by the Summary Tribunal of Alexandria on April 3, 1934: *Bulletin de l'Institut juridique international*, vol. 36, p. 273; *Annual Digest*, 1933–4, Case No. 172.

[6] *Commentaries upon International Law*, vol. II (3rd ed., 1882), pp. 270, 275.

[7] *Völkerrecht*, vol. II (German ed., 1883–6), 822.

[8] *Etats et Souverains, personnel diplomatique et consulaire . . . devant les tribunaux étrangers* (1895), vol. II, p. 54.

[9] *A Treatise on International Public Law* (1902), p. 358.

[10] *International Law*, vol. I (5th ed. by Lauterpacht, 1937), vol. I, p. 656.

[41] *A Digest of International Law* (1906), vol. V, p. 61.

[12] *International Law, chiefly as Interpreted and Applied by the United States* (1922), vol. I, p. 806.

[13] *Cases on International Law*, vol. 1 (5th ed. by Grey, 1931).

[14] *Elements of International Law* (6th ed., 1855), p. 304.

[15] *Eléments de Droit international public*, vol. 1 (1938), p. 229.

[16] *Diritto internazionale pubblico* (1937), p. 381.

Hall appears to treat the exemption as something almost too obvious to need stating, as he simply says: "For obvious reasons a consul is not liable to the courts for acts done by order of the Government from which he holds his commission." It would seem that routine acts done in the course of his ordinary consular duties must be intended to be covered by these words. The Harvard Draft points out that the exemption "is a consequence of the rule of general international law regarding the recognized public acts of one State in the territory of another. The performance of such an act should entail no responsibility, either civil or criminal, on the officer performing such an act." It is further argued[1] that the official acts of a consul are to be regarded like the administrative acts of the consul's Government, and that for the local courts to exercise jurisdiction over them is equivalent to their exercising jurisdiction over the governmental acts of a foreign Government. It is also contended that the immunity results by implication from the fact that the consul possesses a commission from his own sovereign to perform consular duties and an exequatur from the sovereign of the country where he resides agreeing to his performing them, and from the fundamental principle that the consul must have such immunities as will enable him to carry out his duties, and the fact that he could not carry them out properly if he was liable to the jurisdiction of the local courts in regard to them.

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[1] *Le Droit pénal international*, vol. II (1921), at p. 256.

[2] *Guide diplomatique*, vol. I (5th ed., 1866), p. 234.

[3] *Trattato di Diritto Internazionale Pubblico*, vol. II (1882), p. 447.

[4] *Traité de Droit international public*, vol. IV (1888), p. 701.

[5] *International Law*, vol. I (3rd ed. by Baker, 1893), p. 372.

[6] *Principes du Droit des Gens*, vol. I (1896), p. 538.

[7] *Le Droit international, théorique et pratique*, vol. III (5th ed., 1896), p. 233.

[8] *Völkerrecht*, vol. III (1908), p. 222.

[9] *Le Consul: Fonctions, Immunités, Organisation, Exequatur* (1909), pp. 148, 149.

[10] *Le Droit international public positif*, vol. II (1920), p. 75.

[11] *International Law* (8th ed., 1924), p. 375.

[12] *International Law* (1924), p. 377.

[13] *Traité de Droit international public*, vol. I (8th ed. revised by Bonfils, 1926), p. 126.

[14] *Consular Privileges and Immunities* (1926), p. 147.

[15] *Répertoire de Droit international*, vol. V (1929), p 46.

[16] "La Théorie et la Pratique des Services consulaires" in *Recueil des Cours, Académie de Droit International de la Haye*, vol. 34 (1930) (iv), p. 859.

[17] *Traité sur les Fonctions internationales des Consuls* (1937), Ch. II.

[18] In *Journal du Droit international privé* (1895), p. 44.

[19] *Handboek van het Volkenrecht*, vol. II (1933), p. 34.

[20] *Introduzione al Diritto internazionale* (3rd ed., 1938), p. 459.

[21] *Völkerrecht* (1936), p. 15.

[22] Report of Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law.

[23] Harvard Law School, *Research in International Law.*

[24] Article 18 of Draft.

[25] Article 5.

IV. *The Juridical Basis of Consular Immunity*

It is perhaps desirable to consider whether the immunity of the consul from process in respect of his official acts is covered otherwise than by a specific rule relating to consular acts. It is, of course, true that, as the law of the country where the consul resides does not enjoin upon him the performance of any consular functions, he could not be liable under that law and before the local courts for mere failure to perform them. But this would not cover nearly all the ground, as a person who is under no pre-existing obligation to perform any service may become liable for failure to perform it or for performing it negligently or too late, if he undertakes to do so, especially if (as is often the case for consular services) he receives payment for it. Further, a consul would not be exempt on this ground against such claims as that, in the course of his official duties, he had committed a tort such as defamation in a consular report, or false imprisonment or malicious prosecution in cases where he had ordered a seaman from one of his ships to be imprisoned on board, as it is part of his duty to do in certain circumstances.

Is the immunity of a consul for his official acts covered by the immunity of his Government from process? It is clear that in some cases the immunity of the foreign State does cover the official acts of its consul, e.g., actions based on a contract which the consul has concluded as agent for his Government and process against consular property which belongs not to the consul but to his Government.[2] (In cases where the consul has not contracted as agent for his Government and the other party has given credit to the consul, it is proper that there should be no immunity.) Further, perhaps the principle that an agent of the Crown is not liable for breach of warranty of authority to conclude a contract[3] also applies to the agent of a foreign Government, but no case on this point has been found.

But in cases of tort, the usual principle is that the orders of the principal are no defence to the agent, and this principle applies to the servants of the Crown. Is it the case that the orders of a foreign sovereign are in all cases a defence to an action in tort against his agent—whether consul or otherwise? If the immunity of a foreign sovereign extends so far, then no doubt it does cover most, if not all, the cases where the consul could be sued in regard to matters arising out of his official duties, and there is little necessity for any special rule with regard to consuls. Certainly, some of the arguments referred to above as to the grounds on which the immunity of official consular acts rests, and the reasoning of some of the foreign decisions,[1] suggest at first sight such a view as to the scope of the immunity of foreign Governments. Fedozzi[2] puts the immunity expressly on this ground. If this view as regards the scope of the immunity of a foreign sovereign is correct, no doubt the English courts will give effect to it. Moreover, if the ground for the immunity of the consul in respect of his official acts is regarded as a branch of the immunity of his Government (as it is in the minds of some authors), then a failure to mention it in treating of consuls is explained and the omission becomes of no significance as regards the existence or otherwise of the immunity.

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[1] See, for example, Puente, *op. cit.*

[2] See, for example, *Lyders* v. *Lund*, as reported in *Annual Digest*, 1929–30, Case No. 321; *Mazzucchi* v. *American Consulate, ibid.*, 1931–2, Case No. 186; *Consular Premises* (*Greece*) *Case, ibid.*, Case No. 187, and, in particular, Moore, *Digest*, vol. V, pp. 61 *et seq.*

[3] *Macbeath* v. *Haldimand* (1786), 1 T.R., 172.

It is not certain, however, whether in England at any rate the immunity of a foreign sovereign does protect his agents of any kind in respect of torts committed by them as agents, and if this is so in the case of torts, *a fortiori* in the case of crimes.[3] There is little authority on the point, but it will be noticed that in the case of *Vavasseur* v. *Krupp*,[4] where an agent of the Emperor of Japan introduced shells into England which violated the plaintiff's patent rights, there are dicta[5] to the effect that an action for damages will lie against the agent, although the shells—the Emperor's property—must be released. It is also of interest to note that in an opinion given on August 9, 1855, Attorney-General Cushing of the United States stated that violations of United States Foreign Enlistment Acts by foreign consuls would be punishable by the courts. These acts were of course outside consular duties, but done on the orders of their Governments. The most solid basis for the rule as regards consular acts is that the consul is received by the country where he resides as a consul to perform consular duties as the officer of the foreign State—considerations which do not apply to every person who acts as agent for a foreign Government—and it must be implied from this that the consul shall enjoy independence from the local jurisdiction as regards the performance of his consular duties. It is safer therefore to base the immunity on the narrower ground of an express immunity for official consular acts for which there is so much specific authority rather than on an extension of the immunity of a foreign sovereign which would cover the acts of agents who were not diplomats or consuls and held no formal office recognized by the State on whose territory the acts were performed.

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It can hardly be contested that it is essential for the proper discharge of consular duties that a consul should be immune from process in the local courts in respect of them. The instances of possible actions if this principle is not recognized, referred to above, show the dangers to which he would otherwise be subject. No doubt other instances could easily be given. In the interest of the performance of their functions by consular officers abroad, Governments have every reason to uphold the principle. Recognition of the immunity in this case does not, of course, mean that if, for instance, a British subject is wrongfully injured by the official act of a foreign consul in Great Britain there is no remedy, but merely that the remedy must be sought through the Foreign Office and the diplomatic channel as is the practice in the case of diplomatic officers, and, speaking generally, this remedy is not less efficacious and is certainly cheaper than recourse to the courts. The taking up of a case with the diplomatic mission is itself a strong means of pressure which is generally sufficient, and as a last resort in a flagrant case the exequatur can be withdrawn. Moreover, in some cases waiver of the immunity may be asked for and given. Indeed, in certain cases it may be the consul's own Government which desires that the consul should be punished or made personally liable. Requests have been received for the prosecution of foreign consuls for peculation. The Quebec decision in *Campbell* v. *Cour des Sessions générales de la Paix*[1] is another type of case where a request for prosecution might well have been made by the consul's Government. It would be for the court to decide whether a given case fell within the scope of consular duties or not. There would, it is submitted, be no danger of any undue extension being given to consular duties such as would lead to a consul being held exempt from penalties for driving a motor-car contrary to the law because he was on his way to his office and not on the return journey home.[2]

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[1] E.g., *Little* v. *Riccio and Fischer*, 1934 *Clunet*, p. 1071; *Annual Digest*, 1933–4, Case No. 68. *Mazzucchi* v. *American Consulate*, *ibid.*, 1931–2, Case No. 186.

[2] *Introduzione al Diritto internazionale* (3rd ed., 1938), p. 459.

[3] It seems unlikely that many consular acts done in the performance of official duties recognized by international law could be criminal.

[4] (1878) *L.R.* 9 Ch. D. 351.

[5] At pp. 355 and 358.

The legal authority referred to in the preceding paragraph in favour of the existence of the rule seems to be no less than that which can be cited in support of most international rules and sufficient to secure the recognition of the rule by English courts. The rule does not assimilate consuls to diplomatic representatives, for the latter are entitled to jurisdictional immunities in respect of acts both private and official, and when once this is realized, the courts should find no difficulty in recognizing and applying what has become a rule of customary international law supported by an impressive unanimity of authority and based on cogent reasons.

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[1] See above, p. 42.

[2] In *In re Vukotich* the Italian Court of Criminal Cassation restored the conviction of the Yugoslav Consul-General in Genoa who ran into and fatally injured a pedestrian: *Annual Digest*, 1933–4, Case No. 171.

VITAL INTERESTS AND THE LAW

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To say that international law is a failure, if by failure we mean that it has not succeeded in doing for states what they have asked of it, is a mistake. For on the contrary it does what they ask it to do reasonably well on the whole. The real trouble is that they have not asked very much of it; they have allotted it a modest rôle in their relations, a useful and even a necessary rôle, but still not a rôle of the first importance. In effect they are willing to use it for the conduct of their intercourse and the settlement of their differences so long as that intercourse and those differences do not relate to high politics, and within those limits they both allow and desire it to be effective. In their normal relations most states do not bludgeon their way through opposition; they use the processes of law. There is far more legal business always going on between them than laymen, or most lawyers for that matter, realize; and the conduct of all this business is possible because the assumptions on which it is based, that states generally keep their treaties, that they do not ordinarily break acknowledged rules of law, and that they accept the judgments and awards of courts even when these go against them, can, as experience shows, be generally relied on. All this is good as far as it goes, and it is unfortunate that it should not be more generally known.

But in the days before the first Great War, when statesmen did not find it necessary to wrap up their intentions towards the pretensions of international law in high-sounding phrases, arbitration treaties used to express in unambiguous terms the limits beyond which the rule of law was not to extend. States would readily undertake to arbitrate their differences, but only if they did not affect their "vital interests", and it was understood that it would be for each party to decide for itself what this included. The treaties began, therefore, as one of the delegates to the Hague Conference said, with the imperative "thou shalt", and ended with the reassuring words "if thou wilt". There is little sign of any real change in this attitude to-day. In the treaties made between the wars the draftsmen have been more discreet in their language; they have had to accommodate it to the growing popular interest in these matters, but they have discovered formulas which give much the same result. Even the acceptances of the Optional Clause, numerous though they have been, have been accompanied by so many qualifications that the advance that they mark is less than is commonly supposed. On the whole it remains true that states in general regard some of their interests and policies as so "vital" that they mean to remain free to assert them, if need be, whatever the law may say about them, and moreover to decide for themselves which among their national interests they will regard in this way. Whether this limiting of the rôle of law in international affairs to matters which, though important in themselves, are of secondary importance when compared with the great issues of international politics is destined to be permanent or not, is surely one of the greatest of the open questions of the future.

To say that the root of the evil is that states cling to their sovereignty, and that therefore the line of progress is to take this sovereignty away or to reduce its range, does not carry the matter any further. That may be true; there is a sense in which it certainly is true, but all it does is to put a practical difficulty into a vague and abstract form which opens up endless opportunities for a warfare of words. Sovereignty is not a physical thing that a state can hand over in the way a soldier hands in his kit when he is discharged; it is merely a word which has changed its meaning repeatedly in the course of centuries of usage, and which to-day has different meanings in different contexts and in the mouths of different people. As Sir John Fischer Williams has well said, "the adjective sovereign has a pleasing and flattering sound, and appears to have attached itself to the substantive state inseparably as a kind of homeric epithet in defiance of its appropriateness to the occasion".[1] The questions to which we need answers are practical ones, questions of ways and means, and if the answers can be found, theories of sovereignty will easily accommodate themselves to any change in the relations of states that they may involve.[2]

Montesquieu has a passage in the *Esprit des Lois*[3] which shows that he would have regarded this attitude of states not only as reasonable, but as the only reasonable attitude for them to take up. "Il est ridicule", he says, "de prétendre décider des droits des royaumes par les même maximes sur lesquelles on décide entre particuliers d'un droit pour une gouttière." We may or may not agree, but it does not seem right to dismiss his view out of hand. Certainly we cannot dispose of it by pointing out that inside the state we take it as a matter of course that individuals should not be allowed to withdraw even their highest interests from the dominion of the law, and arguing from that supposed analogy that there can be no sound reason why states should not be similarly submissive. Nothing more false has ever been said by a great man than the saying of Hobbes that a State is "but an artificial man". It is nothing of the kind, nor is international law, as some modern writers have told us, only private law "writ large". International lawyers can learn much from analogies taken from the State if they use the right analogies, but wrong analogies—and this is one—can be disastrous to clear thinking about their subject. It is unwise to condemn the present attitude of states as merely unreasonable and obstructive without having asked ourselves whether it has any justification, or at any rate explanation.

Writing on Arbitration in his *Studies in Diplomatic History*[4] Sir James Headlam Morley has defended the concept of vital interests as being valid and just, and lawyers would do well to ponder the reasoning which led him to that conclusion. He was writing as historical adviser to the Foreign Office, primarily therefore for statesmen and not for lawyers, but this is a matter on which it is not at all likely that lawyers will have the last word. Sir James took most of his examples from the history of the United States, not because the United States is the only power which has been resolutely and consistently determined to secure certain interests of her own at all costs, but because she has informed the world more clearly than most other powers what the interests were upon which she would insist. Thus the former colonies had no sooner won their independence than they began to entertain ambitions of vast territorial expansion which were certain to bring them into conflict with the established rights of other countries, and which did in fact lead to many occasions of acute friction and to one occasion of actual war. On the whole circumstances favoured them, but "no one can doubt", says Sir James, "that had they met with more resolute opposition, no arbitral decision, no apprehension that technically they were acting as aggressors, would have diverted the United States from the pursuit of this purpose. They had in mind a great constructive policy, and, if necessary, would at any time have been ready to devote to it the whole of their strength and resources. The real justification for their action is to be found not in the methods by which the country was acquired, but in the use which they made of it. The historian of the future will record that in these vast territories they built up an orderly and effective system of government, and thereby added to the prosperity of the world."

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[1] *Chapters on Current International Law*, p. 285.

[2] As has happened in American law, which regards the United States and the several States of the Union as "two sovereignties deriving power from different sources, capable of dealing with the same subject matter [in this case prohibition] within the same territory". These words of Taft, C.J., in *U.S.* v. *Lanza*, 260 U.S., may be disturbing to some academic students of the nature of sovereignty.

[3] Bk. xxvi, Ch. 16.

[4] Pp. 42–50.

Further, in the Monroe Doctrine and in the corollaries which the United States has attached to it from time to time she has given notice to other nations of even wider interests of her own on which she would insist, and these nations have known therefore that to stand in the way of those interests, even if in so doing they would merely be exercising rights which the law allowed them, would be to risk war with the United States. For the demands which she has made on other nations have not been founded exclusively on her own rights, or on duties which they owed to her according to law; on the contrary she has required them to refrain from using rights which undoubtedly belonged to them at law, as, for instance, to refrain from acquiring new territory on the American continents even with the consent of the people of the territory concerned, and from transferring possessions in America from one European state to another. Fortunately for the United States the objects which she was determined to secure were generally more important to her than the denial of them would have been to the other countries, and these countries therefore, when faced with the alternative, were not willing to challenge her policy in war.

Other countries also have interests comparable to these of the United States which they regard as vital and are in no circumstances willing to surrender. For Britain, for example, there is the principle that the Low Countries or the Persian Gulf shall not fall under the dominion of a great military or naval power; for France, that no Great Power shall establish itself in north-west Africa; for Russia, that no other Power shall take over the control of the Straits from Turkey. Finally, Sir James Headlam Morley suggests as his conclusion that if in the past the doctrine of compulsory arbitration in all international disputes had prevailed and been enforced, the whole political development of Europe would have been held up. "We could not now wish that Russia should still rule in Warsaw and in Helsingfors, that the Austrians should still be in Milan and in Venice, that Belgrade, Sofia, and Bucharest should still be under the government of the Sublime

Porte, or that the unification of Germany and Italy should not have taken place, and that the Yugoslav nation should still be divided between the sovereignty of three other states."

Now to some parts of this argument it may be that lawyers can find an answer. We may doubt, for instance, whether it is quite self-evident that the unification of Germany has been for the good of the world in general, and we may point out that even if it is true, as it may be, that the following by states of their vital interests without being subjected to the restraints of law has often resulted in adding to the welfare of the world, yet this result is only an accidental by-product of the system or lack of system which has existed. There can be no sort of security that this will be the result so long as it has to be taken for granted that each state may define for itself without appeal the interests which it will require the others to respect. The Monroe Doctrine may, as Sir James thinks it has, have worked for the general good, but Germans have probably persuaded themselves that their policy of the Grossraum, which they regard as vital for themselves, would also be recognized as good for the world if only others would appreciate the superiority of a Herrenvolk when it is so plain for all to see. On what ground, other than our own preference, are we to distinguish between these cases? If one state may define and pursue its own vital interests, then others must be free to do the same, and if all states are free to do it, we are thrown back on the law of the jungle. Surely there must be some way of reconciling the legal and the diplomatic ways of approach to this problem of vital interests. Yet if lawyers shut their eyes to the element in the concept which is valid and just, they are likely to be defeated when they try to correct what is neither valid nor just in it. For, as things are, these interests have power behind them, and facile denunciations of "power politics" are neither a helpful nor a sensible way of dealing with the situation. Vital interests are a real problem, not just because it would be idle to lay plans for the future of international law as if they did not exist, but also because it would be wrong to disregard them even if we could.

Yet the present state of things, in which each state defines its own interests for itself, and no means exist for distinguishing those that are reasonable from those that are not, is indefensible. Somehow or other the legal system must find means of satisfying the vital interests of states so far as they are reasonable, or they will continue to endanger it from the outside as they do at present, and at the same time it must be given the strength to reject those which are either spurious or unreasonable. But it seems likely that the attainment of this ideal may call for some revision of our ideas of the lines of development which we commonly take for granted that international law ought to follow. We often speak of international law as a system of law at an early stage of legal development, and so in a sense it is; but that may suggest to our minds the notion that when it has become more mature, it will be very much like the only mature systems of law of which we have direct experience, namely, those in advanced states, except for the fact that it will of course still be operative in a different field of social relations. But that seems a rash assumption. A society in which the units are states will always differ profoundly from one in which they are individuals, and this difference will be reflected in the form and the structure and the procedures of the two kinds of law. We may hope that international law will some day be a system comparable in strength to municipal law, but we should also be prepared to find that in order to achieve that end it will develop devices of its own.

One important respect in which international legal situations differ from the situations to which municipal law has to be applied is that they are so often *unique*. Generally speaking, law can deal with individual human beings as if they were all alike, because in fact they are very much alike; if we allowed the law to take too much account of their differences where these do exist, to be modified to meet all the "hard cases", we should, as the saying goes, make "bad law". But states are not alike, nor are their interests; their interests are determined by circumstances, political, economic, strategic, geographical, which so far from being common to states in general are often peculiar to the particular state concerned. When law deals with individuals, we rightly demand that it should be impersonal, that it should be no respecter of persons; but that is an ideal which international law, if it is to be a just law, can aim at only in some and not in all the relations of states with which it has to deal. Professor H. A. Smith[2] has shown, for example, that we cannot expect the development of general rules of law applicable indifferently to all rivers of international concern, because each great river system is a unique thing and it requires to be regulated under a régime which is adapted to its own particular circumstances. But that is only one illustration of a characteristic to be found in very many of those relations between states to which in the interests of international order and stability it is desirable that legal regulation should extend, and it can sometimes be met, as Professor Smith shows that it can best be met in the case of rivers, by the constitution of a special authority, with powers and duties appropriate to the special circumstances of the case. But in those interests of states which are really "vital" this element of particularity is almost certain to be present, and to attempt to control them by rules of law which take no special account of this particularity, and treat them as if they were merely instances of types or categories of legal situations, is almost certain to be unsatisfactory and to meet with resistance. That is not to say that all the interests which a state chooses to regard as vital are interests which the law should regard as unique; it is the vice of the present state of things that states are able to use the umbrella of vital interests to shelter interests which are not in truth vital at all, but merely interests which it desires to withhold from the domain of law. But we shall not be able to correct this vice of the present system unless we recognize that there are interests which really are vital, that they constitute a real problem, and that they neither can nor ought to be dismissed by demanding that states should submit them to a system of law which does not provide any guarantee that they will be safeguarded.

This problem of vital interests is closely bound up with the problem of war, for war is the instrument by which in the last resort states assert them.

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[1] This subject has been elaborated in a valuable course of lectures by Professor Schindler of Zürich on *Les Facteurs Sociologiques et Psychologiques de Droit International* in vol. 46 of the *Recueil* of the Hague Academy of International Law. He points out that practically the only thing that all states have in common are the possession of territory, and sovereignty over their own nationals. In every other respect each of them is unique.

[2] See his book, *The Economic Uses of International Rivers.*

But there are two possible views of the relation between the two, and the issue between them is one of priority. There are some who hold that there can be no solution of the problem of war until states have been induced to submit all their interests unconditionally to the arbitrament of law as administered by courts. Thus Professor Kelsen has written recently[1] that "to eliminate war, the worst of all social evils, from interstate relations by establishing compulsory jurisdiction, the juridical approach to an organization of the world must precede any other attempt at international reform. . . . The elimination of war is our paramount problem. It is a problem of international policy, and the most important means of international policy is international law." He goes on to admit that the failure of the Kellogg Pact, which was essentially an attempt to use international law as a means towards the international policy of eliminating war, may seem to be a weighty argument against a purely legal approach to the problem of peace, but the Pact, he believes, failed for quite other reasons than this. He believes that it failed, firstly, because it prohibited *any* kind of war, even war as a reaction against a violation of law, without replacing this sanction of international law by an internationally organized sanction, and, secondly, because it did not oblige states to submit all their conflicts without exception to the compulsory jurisdiction of an international court.

This seems to me to be a profoundly mistaken view, and I do not know of a single vestige of evidence in the history of the years since the Pact was made for the second of these reasons given for its failure. The reason for its failure seems to me to be plain. It failed because it mistook the order of priority which must be followed in the campaign to eliminate war. It failed because it was based on the delusion that law creates order, whereas the truth is that it is only order already established that can provide the soil in which law can take root and flourish. If a social system does not give its members a decently secure order, they must individually try to create such an order for themselves; they are left with no choice but to make defence their first and constant preoccupation to the utmost limit of their abilities. It is so with states. Most of these vital interests which the law finds so intractable have their origins in the insecurity of the existing order, in the fact that every state has hitherto had to make its own defence the prime consideration of all its policies, and so long as that state of things continues, it is inevitable that the interests of defence should be given priority over everything else, including respect for the law. It is inevitable, too, that in an unorganized world each state should claim to decide for itself what these interests are. That opens a wide door to every kind of abuse, but the irony of the situation is that the door neither can nor ought to be shut so long as the security of each state is left to depend upon itself alone. If that state of things could be altered, if a world security order in which states had confidence could be established, the whole outlook for international law would be transformed, and the most difficult kind of vital interests would begin to lose their urgency and might in time be brought within the domain of the law. Assurance of order would take the sting out of the problem, for the law would be offering states something better than they can get for themselves.

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[1] *American Journal of International Law*, July 1943, pp. 397–8.

This does not mean that the solution of the problem of vital interests is simple, but only that it can be simply stated. It is just one aspect of the problem of war, one aspect therefore of the most difficult of all the problems before international law. Over-simplification comes from those who suppose that a purely juridical approach to the problem is enough, that there is nothing in it which cannot be satisfactorily disposed of by the law as it stands if only states and statesmen would be more reasonable. Even in an assured international order, however, if the law is to deal justly with the interests of states, its structure and methods will have to be adapted to the particularity which is the outstanding characteristic of so many of their relations. That probably means that we ought not to look for a prolific growth of general rules on the lines that seem to be indicated by projects to develop the law by the process commonly referred to as "codification", for these assume a uniformity in international legal situations which often does not exist. It seems more likely that the progress of the law for which we all hope will more often take the form of the creation, by treaties, sometimes bilateral and sometimes multilateral, of special rules to deal with special relations between states or with special regions of the world which are of concern to more nations than one (as already in the régimes instituted for the Straits or for the Suez Canal); sometimes, too, of the setting up of special organs endowed with functions, administrative, judicial, perhaps even legislative, appropriate to the particular subject or region which they will be charged to regulate. The work of international judicature will continue to be, as it is to-day, predominantly one of the interpretation of treaties, for the notion that it can ever play the frankly law-creating part that national judicatures have played in the early history of states seems to rest on that delusive analogy between the individual and the state that falsifies so much thinking on international affairs.

THE LAW OF NATIONS AND THE PUNISHMENT OF WAR CRIMES[1]

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I

The question whether the punishment of war crimes committed by the enemy is desirable, expedient and practicable is a problem of politics rather than of law. It includes such questions as the relative merits and disadvantages of providing a deterrent against criminal violations of the law of war; the prospective effectiveness of such deterrent; the taking into account of a widespread and not inherently reprehensible desire for retribution; the consequences of impunity upon national and international law and morality; the desirability, partly in the interest of the culprits, of containing a hitherto ruthlessly suppressed craving for revenge within the channels of a regularized legal procedure; and the effects of a policy of punishing war crimes upon the prospects of reconciliation or, at least, of a return to a minimum degree of normalcy in international relations. It is not proposed to discuss these questions in the present article.

There is, however, one series of considerations which lies in what may be described as the realm of legal policy, but which the international lawyer and those who have at heart the future of international law may find it difficult to leave on one side. War crimes are crimes against international law. Punishment of these crimes, however distasteful it may be in its concrete application, is a by no means belated measure of enforcement of international law. The maintenance of the authority of the law of nations is inconsistent with the view that it is a system of law whose means of enforcement are confined to pressure of public opinion or pecuniary compensation, and that as it is a law between, but not above sovereign States, the very idea of punishment is repugnant to its fundamental notions. International law must reject the idea that it is, in this matter, doubly impotent for two contradictory reasons usually adduced in support of this view: (1) because it is legally inadmissible to punish the State as such on the ground that the corporate entity of the State cannot properly be deemed to possess a criminal intent and be the object of criminal punishment in the persons of its organs; and (2) for the alleged reason that it is legally improper to visit punishment upon individuals on the ground that the precepts and the injunctions of international law are not addressed to individuals but to the corporate entity of the State.[2] These views have been given currency with particular reference to the question of war crimes in disregard of the fact that the potentialities for irretrievable mischief inherent in the modern State call for an intensification rather than a relaxation of the repressive, deterrent and punitive consequences of criminal conduct.

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[1] This article has grown out of a Memorandum submitted in July 1942 to the Committee concerned with Crimes against International Public Order (under the chairmanship of Sir Arnold D. McNair). The Committee was set up by the International Commission for Penal Reconstruction and Development established by the Department of Criminal Science in the University of Cambridge.

[2] For a recent advocacy of this point of view see Manners in *American Journal of International Law*, 37 (1943), pp. 407–435. But see Finch, *ibid.*, pp. 81–88; Cohn in *Transactions of Grotius Society*, 26 (1940), pp. 125–51; Schwarzenberger in *Czechoslovak Year Book of International Law*, 1942, pp. 67–88; and Hyde in *Proceedings of the American Society of International Law*, 1943, pp. 39–46.

Once we have dissociated ourselves from a trend of thought which is juridically unsound and retrogressive, we shall be justified in giving—and bound to give—full weight to any possible legal limitations upon the right of the victor to punish enemy nationals accused of war crimes and to any safeguards calculated to ensure the proper exercise of that right. For the cause of international law demands not only the punishment of persons guilty of war crimes. It requires that such punishment shall take place in accordance with international law. Circumstances accompanying the defeat of the enemy, the confusion surrounding the transfer of authority in territory which he had occupied, and the release of suppressed passions may result in acts of summary retribution which foresight and magnanimity may not be able to prevent. But in so far as the punishment of war crimes is intended to take place within the framework of a legal process, it will enhance both its effectiveness and the respect for international law if such limitations as the law of nations imposes are rigidly adhered to. Moreover, there must not only be in fact just punishment. That punishment must also appear to be just and in accordance with the law as the result of the effective provision of practicable measures of impartiality and mutuality.

In the existing state of international law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor. This is so in particular when, as may be the case at the close of the second World War, the victorious side represents the overwhelming majority of states and when there are few neutral states left capable of ensuring the impartial administration of justice. Circumstances such as these constitute an additional reason why the manner in which the punishment of war criminals takes place should be not a manifestation of victorious power but an act of international justice. Moreover, the very effectiveness of the attempt to punish war crimes depends to a large extent on the preservation of the essential requirements of fair and impartial judicial process inasmuch as their absence must influence the decision of neutral states to extradite or surrender persons accused of war crimes who have taken refuge in their territory. For these reasons it is proposed to examine in this article the following questions:

(1) What, if any, is the legal basis and justification of the demand, unaccompanied by a reciprocal offer, made upon the defeated State to surrender war criminals to the victor?

(2) What are the legal limitations upon the right to punish war crimes, in particular having regard to the absence or the varying degrees of criminal *mens rea* as the result:

- (i) of obedience to superior orders;
- (ii) of the uncertainties of rules of warfare;
- (iii) of the operation of reprisals?

(3) What are, in this matter, the possible safeguards of impartiality and of a requisite measure of legal equality as between the victor and the vanquished?

(4) What are the basis and the extent of the legal duty, if any, of neutral States to extradite or to surrender war criminals who have taken refuge on their territory?

It is proposed to examine these questions in a general manner, though much of what follows necessarily refers, directly or by implication, to the question of the punishment by the United Nations of war crimes committed during the second World War by Germany and her allies.

II. *The Legal Basis of the Demand for Surrender of War Criminals*

In the course of the second World War, the Governments of most of the United Nations gave repeated expression to their intention to demand, as one of the terms of the armistice, the surrender, for trial and punishment, of nationals of their adversaries accused of war crimes.[1] What is the legal basis of such a demand? Is it the mere power of the victor to exact vindictive retribution from the defeated State and to challenge accepted notions of equality before the law by the underlying assumption that his—the victor's—forces or authorities have been free of any imputation of violating the law of war? Or is it a right, or the corollary of a right, which is firmly grounded in the principles and in the practice of international law?

There may be room for the view that the war crimes committed by Germany and her allies during the second World War were so unprecedented in their premeditation and ruthlessness as to warrant a departure from accepted forms and principles of international law. That view might be supported by the independent, and probably unimpeachable, argument that the armistice or the treaty of peace are not acts of application of international law. The law of these instruments is the will of the victor; there are, in theory, few limits to his power to change established law and precedent as between himself and the vanquished. However, the victor may justly consider it unwise to disdain the aid which existing law is in a position to offer. He may consider it unwise to do so at the close of a war the essential purpose of which is to vindicate the law of nations—a claim on the part of the United Nations which history is unlikely to stigmatize as sanctimonious and false. For a considerable period after the first World War German writers gave emphatic and repeated expression to the accusation that the provisions of the Treaty of Versailles for the surrender of German war criminals were in flagrant contradiction both with international law and with general principles of law. They were supported by writers in other countries.[1] It is possible that that view, somewhat uncritically accepted, was not without some effect on the eventual fate of these clauses of the Treaty. It is, accordingly, of importance to scrutinize the accuracy of any similar accusation in relation to the corresponding demand of the United Nations in the second World War.

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[1] These include: the Declaration of 13 January 1942, adopted by the Governments of Belgium, Czechoslovakia, Greece, Luxemburg, the Netherlands, Norway, Poland and Yugoslavia and by the Free French National Committee (Document issued by the Inter-Allied Information Committee, London, H.M. Stationery Office, 1942); the statement by Lord Simon, Lord Chancellor, on 7 October 1942 in the House of Lords, outlining the task of the proposed United Nations Commission for the Investigation of War Crimes (*Parl. Debates*, House of Lords, vol. 124, pp. 577 *et seq.*) and endorsed on the same day by the President of the United States; the Declaration on Atrocities adopted in October 1943 at Moscow by Great Britain, the United States, and Russia. The main part of the Declaration may conveniently be quoted:

"At the time of the granting of any armistice to any Government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from all these countries, having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France and Italy.

"Thus Germas who take part in wholesale shootings of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in the territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to the accusers in order that justice may be done.

"The above declaration is without prejudice to the case of German criminals, whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies."

The first relevant fact in the situation is that the practice and the doctrine of international law as well as the municipal law of a considerable number of states recognize that a belligerent is entitled to punish for war crimes those members of the armed forces of the opponent who fall into his hands. There is hardly a dissenting voice in the general approval of that rule. Neither is it a new doctrine in international law. Francisco de Vitoria, writing in 1532, stated the underlying principle in *De Jure Belli*: ". . . etiam parta victoria, recuperatis rebus, pace etiam securitate habita, licet vindicare injuriam ab hostibus acceptam, & animadvertere in hostes, & punire illos pro injuris illatis. . . ." He elaborated the wider reasons of the validity of this principle: ". . . nec pax, nec tranquillitas, quae est finis belli, aliter haberi potest, nisi hostes malis & damnis afficiantur, quibus deterreantur, ne iterum aliquid tale committant."[2] Grotius, while pleading for prisoners of war who have surrendered or desire to do so, says: "in order to warrant their execution it is necessary that a crime shall have been previously committed, such a crime, however, as a just judge would hold punishable by death."[3] Christian Wolff, the German philosopher and lawyer, writing in 1764, reproduces, almost literally, the same view.[4] Johann Jakob Moser, a leading German positivist writer of the same period, is even more emphatic: "Enemy combatants who act contrary to international law need not, when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers and so on."[5] The Institute of

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[1] It may be of interest, as showing the strength of the feelings of German jurists on the subject, to quote a passage from the Opinion of Professor Meurer, a German Privy Councillor and an international lawyer of repute, delivered in the course of the work of the Commission on War Crimes appointed by the German *Reichstag* after the first World War. Referring to Articles 228–30 of the Treaty of Versailles, he said: "The Allies thus imposed upon Germany a breach of most elementary legal principles and a forced departure from entire German legal history. Already in 1356 the Golden Bull prohibited 'for all times' the delivery of Germans for punishment by a foreign State. It declared that this prohibition was merely a confirmation of an immemorial right and custom. . . . The German Government could not, it is true, prevent Articles 228–30 of the Treaty of Versailles from becoming law, but when it came to giving effect to their provisions, the torn German people rediscovered its unity and resisted like one man a demand which constituted a cultural outrage" (*Völkerrecht im Weltkrieg* (as to which see below, p. 84), vol. III (1), p. 57).

[2] V. Prop., 19.

[3] Book III, XVI. I.

[4] *Jus Gentium Methodo Scientifica Pertractatum*, § 798.

[5] *Grundsätze des Völkerrechtes in Kriegszeiten* (1752), § 18.

International Law expressed the same view in 1882.[1] Holland, writing in 1908, was very definite on the subject: "Individuals offending against the laws of war are liable to such punishment as is prescribed by the military code of the belligerent into whose hands they fall, or in default of such code, then to such punishment as may be ordered, in accordance with the laws and usages of war, by a military court. . . . When a whole corps systematically disregards the laws of war, e.g., by refusal of quarter, any individuals belonging to it who are taken prisoners may be treated as implicated in the offence."[2] It is unnecessary to amplify these citations of authorities.

As will be submitted presently, this generally acknowledged right of the belligerent to punish enemies guilty of war crimes, far from being irrelevant to the question of the legal propriety of demanding the handing over of criminals to the victorious belligerent, is closely related to it. In the meantime it is sufficient to note that the general recognition of that right supplies a conclusive answer to those who regard as legally abhorrent the idea of the belligerent, favoured by the accident of being able to possess himself of the person of the enemy, acting as judge in his own cause. In default of a reasonable prospect of war crimes being punished by the offender's own State,[3] and in the absence of conditions rendering possible a truly international tribunal, there may be justification, subject to practicable judicial safeguards, for risking the taint of partiality associated with the application of the law by the injured party.

However, the generally acknowledged right of the belligerent to penalize the infractions of the law of war committed by the forces of his opponent is grounded in legal considerations more persuasive than the mere fact of the general recognition of that right. What are these considerations? In so far as war crimes have been perpetrated in the territory of the belligerent claiming the right to inflict punishment, they may be deemed to be covered by the ordinary territorial principle of criminal law. A State is entitled to punish crimes committed on its territory.[4] The application of the territorial principle covers, in the first instance, all violations of international law in the territory under military occupation of the enemy—the main source of war crimes in the second World War. For it is fundamental that the territory occupied by the enemy remains under the sovereignty of the belligerent temporarily divested of his jurisdictional rights. For this reason, jurisdiction thus accruing under the territorial principle covers crimes committed not only against the nationals of the State whose territory is subject to belligerent occupation, but also against the nationals of other states, including those of the occupying power—as in the case of the Jewish nationals of Germany brought by her to occupied territories during the second World War in pursuance of a proclaimed policy of racial extermination—and against stateless persons. The same territorial principle includes crimes committed in and from the air over the territory of the State assuming jurisdiction. The question of the extent to which acts committed in the course of air warfare may properly come within the purview of punishment of war criminals is discussed below,[1] but there ought to be little doubt that, in so far as they have taken place over the territory of the State which is in a position to claim jurisdiction, they are covered by the territorial principle. This is so particularly in view of the almost universal acceptance of the principle of the sovereignty of the state in the superincumbent air. The same applies, finally, to acts committed on the high seas by naval or air forces of the enemy seeing that the effect of such acts takes place on the vessels of the belligerent claiming the right to punish war crimes. This extension of the territorial principle received the approval of the Permanent Court of International Justice in *The Lotus* case; even prior to that case it had substantial authority behind it.[2] Thus interpreted, the territorial principle would cover effectively any war crimes committed against vessels—and their passengers and crews—of the United Nations by enemy ships or enemy aircraft.

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[1] *Annuaire*, V (1881–2), p. 174.

[2] *The Laws of War on Land*, §§ 117, 118.

[3] See below, p. 85.

[4] The issue has been occasionally obscured in reliance on the principle of immunity of armed forces on foreign soil. The ordinary rules of extraterritoriality, based on international comity and consent implied from the mutual respect for the rights of sovereignty in time of peace, do not obtain in time of war. They cover armed forces present on foreign soil *with the permission* of the lawful sovereign—a distinction clearly laid down by Hyde, *International Law*, § 247. In time of peace the operation of the principle of extraterritoriality of foreign armed forces stops short of an immunity for acts directed against the safety of the State. In time of war even forces of an ally are not necessarily immune from local criminal jurisdiction in respect of crimes committed by the members of these forces. See, e.g., the British-Czechoslovak Treaty of 25 October 1940. The conferment of such immunity upon the forces of the United States in Great Britain in 1942 was in the nature of a concession which was not granted without serious consideration of the problems involved. See United States of America (Visiting Forces) Act, 1942, and the Schedule thereto embodying notes exchanged on the subject between the British and American Governments. In any case, the very notion of punishment of war criminals implies an obvious exception to the principle, if any, of the jurisdictional immunity of foreign armed forces. On the contrary view, the belligerent would be entitled to punish war crimes committed by the forces of the adversary in the territory of the latter, but not in his own, occupied, territory.

The territorial principle—the principle that a State is entitled to punish unlawful acts committed within its territory—supplies a substantial, though not the only and not the most important, explanation of the existing rule authorizing a belligerent to punish war crimes committed by the enemy. In the circumstances of the second World War, in the course of which the major part of the European continent was occupied by Germany, the territorial principle thus conceived would cover most of the war crimes with which Germany has been charged. With regard to acts committed in the territory of the adversary, like maltreatment of prisoners of war, the belligerent may, in applying his municipal law to war criminals, rely on the rule, which many states have adopted and which general international law has not stigmatized as illegal, that a State may punish criminal acts committed by foreigners abroad against its own safety or against its nationals.

It has been shown that there exists a broader basis, in addition to the fact of an uncontroverted custom of warfare, for the rule of international law which concedes to belligerents the right to punish such war criminals as may fall into his hands. That basis is the generally recognized right of the State to punish crimes committed within its territory as well as the right claimed by some states and not denied by international law to punish crimes wherever committed against the safety of the State and its nationals. However, this explanation of the established rule, although probably satisfactory in itself, lacks the persuasive force which is indicated in the circumstances unless we realize that the belligerent is, in essence, enforcing not only his municipal law, but also the law of nations. For acts committed by members of the armed forces of the belligerent in the course of hostilities can be treated by the municipal law of the adversary as criminal acts only if there is no justification for them in international law, that is to say, only if they are contrary to the law of war. Such taking of life as is in accordance with the law of war is not murder according to municipal law. Such taking of property as is in accordance with the law governing contributions and requisitions is not theft or robbery. War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action finds no warrant in and is contrary to international law. When, therefore, we say that the belligerent inflicts punishment upon war criminals for the violation of his municipal law, we are making a statement which is correct only in the sense that the relevant rules of international law are being applied, by adoption or otherwise, as the municipal law of the belligerent. Intrinsically, punishment is inflicted for the violation of international law. When the British *Military Manual* authorises punishment for the violation of "recognized rules of warfare" it is referring to violations of international law, and not of English municipal law. The rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings. The rules of war are binding not upon an abstract notion of Germany, but upon members of the German Government, upon German individuals exercising governmental functions in occupied territory, upon German officers, upon German soldiers. When we say that a belligerent has the right to punish members of the enemy forces for violations of the Hague Conventions, we do not intend to assert that he has the right to punish them for the infraction of his municipal law. The Hague Conventions have not, in the case of most states, become part of their municipal law by any express act of incorporation.[1] In no other sphere does the view that international law is binding only upon States and not upon individuals lead to more paradoxical consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war. In the course of the second World War the Supreme Court of the United States, in a case involving spying and sabotage, affirmed emphatically the direct criminal liability of individuals for violations of the laws of war.[1] The immediate subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal character.

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[1] See below, p. 75.

[2] See below, p. 88.

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[1] In Great Britain the Hague Conventions ratified by the Crown are probably binding upon courts independently of special legislation (see McNair, *The Law of Treaties* (1938), p. 17). In Germany, Convention No. IV was appended in 1911 as Annex II to the Army Regulations. This was only in a loose sense in accordance with Article I of the Convention which laid down that "the Contracting Powers shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." In March 1914 the German military authorities issued regulations concerning collective punishment which the *Reichstag* Commission on War Crimes designated as clearly contrary to the Hague Regulations. When in 1901 Major Friederich was instructed to prepare for the use of the army a manual entitled "Customs of War on Land" (*Kriegsbrauch im Landkriege*), he did not refer to the Hague Regulations. He testified on oath before the Commission that he had no detailed knowledge of the Hague Regulations at that time (*Völkerrecht im Weltkrieg*, I, p. 27). The comprehensive Italian Code of the Laws of War and Neutrality of 8 July 1938 does not refer to the Hague Conventions.

Some confusion has been caused, without good reason, by such provisions as Article 3 of Hague Convention No. IV, which lays down that "a belligerent party which violates the provisions of the Regulations shall be liable to pay compensation", and Article 24 of the unratified Hague Rules of Air Warfare, according to which a belligerent State is liable to pay compensation for injuries to persons or property caused by the violation by any of its officers or forces of the provisions relating to aerial warfare.[2] From these and similar rules the conclusion has occasionally been drawn that responsibility for the violation of rules of warfare is limited to pecuniary compensation. There ought to be no doubt that these provisions refer to the responsibility of the State as a whole, and that they were not intended to exclude the responsibility of individuals or the customary right of States to punish enemy individuals for the violation of rules of war.

There is a weighty additional reason why the Hague Conventions must be considered to be binding upon individuals irrespective of the question whether they have been expressly incorporated as part of municipal law. This is so for the reason that they formulate and are largely declaratory of the fundamental rules of warfare as dictated by generally recognized principles of humanity. The same applies to the main aspects of the provisions of the Geneva Conventions of 1929 on the treatment of prisoners of war and of sick and wounded, or of the London Naval Treaty of 1930 and of the London Protocol of 1936 in respect of the elementary duty of safeguarding the lives of civilians in submarine warfare. In their broad purpose, as distinguished from their specific regulations, these international conventions are expressive, in the words of the preamble to Hague Convention No. IV, "of the principles of the law of nations, derived from usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience". Similarly, the relevant provisions of the London Naval Treaty of 1930 are expressly prefaced by the significant statement: "The following are accepted as established rules of international law." When the German *Staatsgerichtshof*, on 16 July 1921, in the case of *The Llandovery Castle*, found the accused guilty of killing defenceless persons in lifeboats, it did so on the ground that they acted against a clear and uncontested principle of international law as against which even the plea of superior orders offered some but not an absolute defence.[3]

The above considerations supply also a corrective to any undue preoccupation with the question as to what law must be applied in connection with the prosecution and punishment of war criminals. That law is, and must be, primarily, the law of nations.[1] For, it must be repeated, it is only to the extent that the acts of the offenders are prohibited by international law, that they can at all be considered as crimes according to the law of the individual states. The fact that the law of nations may be regarded as forming part of the municipal law of the belligerent in question is an important but in no way essential addition to the strength of the jurisdictional claim of the belligerent proceeding to punish persons guilty of war crimes. This being so, it is proper, in assuming jurisdiction over war criminals, to lay stress not on any exceptional or summary character of such jurisdiction, military or otherwise, but on its essential conformity with the law of nations. Once it is realized that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State determined to punish war crimes recede into the background. There is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognizant. There is even no question of procedural retroactivity by subjecting him to a foreign jurisdiction in defiance of established law and principles. The law of Great Britain, of the United States, and of many other States, does not, as a rule, recognize the competence of national courts in respect of criminal acts committed by aliens abroad. But there would be no question of any retroactivity, contrary to justice and to established principles of law, if Great Britain were to alter her law so as to enable her tribunals, civil or military, whether functioning in Great Britain or abroad, to assume jurisdiction over German nationals who committed in Germany criminal offences against British prisoners of war or British civilians in circumstances not authorized by international law.

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[1] *Ex parte Quirin et al.* (1942) 317 U.S. 1. And see comment thereon, from this point of view, by Hyde in *American Journal of International Law*, 37 (1943), pp. 88–91. And see Brierly in *The Norseman*, vol. 2 (1944), pp. 166–172, for a lucid exposition of the view that war crimes are violations of international law as distinguished from the municipal law of the State against which they have been committed.

[2] The Commission which drafted the Rules decided not to include a provision for the punishment of persons guilty of breaches of the crucial articles of the Rules. But, it added, "its absence will not in any way prejudice the imposition of punishment on persons who are guilty of breaches of the laws of aerial warfare" (Cmd. 2201, p. 59).

[3] *Annual Digest of Public International Law Cases*, 1923–4, Case No. 235.

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[1] With regard to the law applied by British military courts, a distinction must be made between the law applied by ordinary courts-martial in the narrower sense of the word and that applied by military courts under martial law. The first is the law mainly laid down in the Army Act, the Naval Discipline Act and the Air Force Act; it governs the conduct and the internal discipline of officers and men of the British armed forces in time of peace and war, both at home and abroad; it is administered by courts-martial—regimental, district, or general —established under these Acts. On the other hand, the law applied by military courts under martial law comes into operation: (*a*) in relation to the civilian population in connection with the suspension of the ordinary law in case of invasion, riots and insurrection, and (*b*) in connection with the application and enforcement of the laws and customs of war by the armed forces of the Crown in occupied enemy territory or in the theatre of war operations generally. We are here concerned with the latter courts only.

These courts, in addition to enforcing the laws and regulations laid down by the commanding general in charge of the occupied territory, apply the laws and customs of war as set forth in Chapter XIV of the *Manual of Military Law* (1929) (Amendment No. 12) notified by the Army Council in the Army Orders for January 1936. Although Chapter XIV of the *Military Manual* has not been given statutory force it is, in general, an exposition of the conventional and customary rules of international law as understood by Great Britain. The business of the military courts, in this particular sphere, is not to apply English criminal law either in its substantive or procedural sense. As said, they apply international law as well as the specific law prescribed by the commanding general in charge of the occupied territory. The discretion of the commanding officer and of the military courts established under his authority is circumscribed by the duty to follow the laws and usages of war. It is significant that in the 1936 edition of the *Military Manual* certain passages in the previous editions of the *Manual*, which emphasized the discretion of the occupying general, have been omitted. The law which these courts apply covers, accordingly, both civilians and members of the enemy armed forces. It is highly improbable that they are bound by the territorial principle of English criminal law. In fact, their primary purpose is to punish offences committed in occupied enemy territory or in the theatre of war operations generally.

At the same time it does not seem to be essential that military courts engaged in applying the laws and usages of war (including the prosecution of war crimes) should be established either within occupied territory or within the immediate vicinity of military operations. The view has been widely held that when Great Britain is at war any portion of its territory is, in relation to enemy aliens, within the "zone of operations". It would appear therefore that the operation of military courts in the wider sense (i.e. courts applying the laws and usages of war) is not necessarily confined to occupied territory or to the area of military operations. Similarly, courts-martial established under the Army Act (or the Naval Discipline Act or Air Force Act) may have conferred upon them by statute jurisdiction over persons, or in respect of acts, not otherwise subject to military law in the narrower sense. Thus in 1914 the Defence of the Realm Consolidation Act (5 Geo. V, c. 8) provided for punishment by courts-martial of certain categories of persons assisting the enemy as if they were subject to military law and had on active service committed an offence under the Army Act. The Treachery Act, 1940, which provided for the death penalty for acts "designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's Forces, or to endanger life", laid down that an alien enemy may be prosecuted for such offences before a court-martial as if he were at the time of the commission of the offence subject to military law. According to the Naval Discipline Act there are subject to the Act spies and persons on board H.M. ships endeavouring to seduce persons subject to the Naval Discipline Act from their duty of allegiance.

With regard to ordinary criminal courts, it is clear that they cannot, according to existing law, exercise jurisdiction with regard to offences committed abroad (except in the matter of offences committed on the high seas or from the air on the high seas and affecting persons on board a British ship). There is probably no serious legal difficulty which would make it impossible for Parliament to alter the existing law in regard to specified categories of war crimes committed abroad. The fact that, as mentioned above, ordinary courts-martial in Great Britain have, by virtue of special war legislation, had conferred upon them jurisdiction over civilians with regard to a number of offences, shows that there is no particular difficulty in the way of modifying established principles, in particular those of a jurisdictional character, in order to meet situations arising out of the war.

It would thus appear that there is no novelty about the principle that a belligerent is entitled to punish such perpetrators of war crimes as fall into his hands; that that principle, far from being a mere assertion of power, grudgingly assented to by international law, on the part of the fortunate belligerent is, in turn, grounded in the fact of recognition by international law of the jurisdiction of States based on the territorial and cognate principles as well as in the fact that in punishing war criminals the belligerent applies and enforces, in essence, the rules of the law of nations which are binding upon the individual members of the armed forces of all belligerents; and that there is no question of any retroactive application of the law from any material point of view.

However, granted that the belligerent is entitled to punish enemy war criminals who happen to fall into his hands, where is the warrant, apart from the undoubted right of the victor to lay down the conditions of the armistice, for the claim that the defeated State should hand over the accused to the victorious belligerent? The answer is that international law permits the punishment of war criminals by the opposing belligerent regardless of the manner in which they happen to fall into his power. The war criminal may fall into the hands of the enemy as a prisoner of war in the course of military operations. But this result may be achieved by other means. The belligerent may possess himself of the war criminals of the enemy as the result of the occupation—before or after the armistice or even after the peace treaty—of enemy territory. Such occupation may be actual or, in the case of the total defeat of the enemy, it may be constructive. After the enemy has been totally defeated, his adversary may proceed to the occupation of the entire enemy territory—a course which, with regard to German territory, was advocated by some at the end of the first World War. In that case he is legitimately in a position to lay his hands on the offenders. If, while abstaining voluntarily from occupying the territory of the defeated belligerent, he stipulates for the handing over of the criminals, what he is in fact doing is to exact from the authorities of the defeated State the performance of a task which he would be in a position to fulfil but for the self-denying decision to refrain from occupation. The entire territory of the defeated opponent is at the mercy and within the reach of the victor. The war criminals are, constructively, in his hands. The defeated and disarmed army of the opponent, as well as his government and administration, are, in a real sense, in the hands of the victorious belligerent. In the event of the second World War terminating with the occupation of the entire German (or Japanese) territory by the armed forces of the United Nations, the war criminals will be seized, either by the occupying Powers or by the German (or Japanese) authorities acting under their direction, and the conditions for the application of the established rule will be fully and literally realized. The situation is hardly different if for political reasons counselling restraint the victorious State refrains from actually occupying the territory of the defeated opponent. The rule of international law which authorises the belligerent to mete out punishment to war criminals who fall into his hands thus covers fully the case of his right to punish those who are, at his will, in his power. This is no mere juridical quibble. To quarrel with it is to quarrel with a rule which is well established as a matter of practice and which has behind it sound legal principle.

In this context it is necessary to consider the objection, on the ground of the absence of mutuality, to the exercise of the right of punishment, on the part of the victorious belligerent, of persons handed over by the enemy. For, clearly, no similar right is conceded to the defeated State.[1] It will be submitted presently[2] that ways may be found for securing a measure of mutuality. But, essentially, the position is not dissimilar to that which arises when the belligerent punishes a prisoner of war for a war crime committed prior to capture. He does so regardless of the ability of the adversary to exercise, effectively, the same right. The same applies to the situation in which war criminals fall, *en masse*, into the hands of the victorious belligerent as the result of an actual or what may be termed a constructive occupation of enemy territory. Undoubtedly, it may happen that the power, thus secured, to exercise the right of punishment may become the monopoly of the belligerent who, in the ultimate judgment of history, has identified himself with the cause of evil. The removal of such contingencies, resulting from the deficient organization of international society, must, like the eventual elimination of war itself, be regarded as a legitimate and desirable object of political endeavour. In the meantime, the victorious belligerent, while applying an inelegant and rough rule of law, must fortify himself by the conviction that in meting out justice he has conscientiously observed the canons of impartiality and the limitations which the existing law of war imposes upon the punishment of war crimes. These will now be considered.

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[1] The word "objection" is not used here in a technical sense. In strict law, there is, as pointed out above, nothing to prevent the victorious belligerent from imposing his own conditions of the armistice.

[2] See below, p. 82.

III. *The Limits of Punishment of War Crimes*

The problem of confining the punishment of war crimes within the limits of international law can be conveniently examined under three heads:
(1) the plea of superior orders;
(2) the uncertainties of the law of war;
(3) the operation of reprisals.

(1) THE PLEA OF SUPERIOR ORDERS

The limitation connected with the so-called plea of superior orders constitutes what is from the practical point of view perhaps the most important problem incidental to the punishment of war crimes. It was widely discussed during the first World War. In its report presented to the Preliminary Peace Conference at Paris in 1919 the Commission on Responsibilities stated: "We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged with responsibility."[1] Although this reference to the plea of superior orders was, in its context, limited to one particular situation, the above statement was probably intended to give a general answer to the problem raised by the plea of superior orders. It appears from the statement as quoted: (*a*) that the Commission desired to dissociate itself from the view expressed, among others, in the British *Military Manual* (as well as in the United States *Rules of Land Warfare*) that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Governments or by their commander are not war criminals and cannot therefore be punished by the enemy",[2] and (*b*) that the Commission did not consider it within its province—or within the reach of agreement among its members—to lay down detailed principles for the guidance of national courts in the matter.

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[1] Printed in *American Journal of International Law*, 14 (1920), p. 117.

[2] Section 443, which continues as follows: "He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter." This principle appears for the first time in Chapter XIV, prepared in 1914 by Professor Oppenheim and Colonel Edmonds, under the title "The Laws and Usages of War on Land". Article 366 of the United States *Rules of Land Warfare* repeats, almost literally, the British rule. There is no trace of it in the Instructions, drafted by Lieber in 1863, for the Government of Armies of the United States in the Field (for these Instructions see Halleck, *International Law*, vol. II, pp. 40–55). Chapter XIV of the British Manual has no statutory force. However, published as it is by the War Office and under the authority of the Army Council, it may fairly be regarded as representing, at the time, an authoritative British view. It is probable that in any case its provisions must be interpreted by reference to other parts of the Manual, in particular to those which stress the duty of obedience to lawful orders only. The view of the law as expressed in § 443, though disapproved of by the Commission on Responsibilities, which included a British representative, set up by the Peace Conference of 1919, appears, unaltered, in the 1936 edition of the Military Manual. It is at variance with the corresponding principles of English criminal and constitutional law (see below, p. 71). It is not believed to represent a sound principle of the law of war, and it is in no sense binding upon Great Britain in the international sphere. But it is clear that, unless the scope of prosecutions for war crimes is to be drastically and unduly curtailed, any British enactment relating to the prosecution of war crimes by British courts, military and other, will have to free them, by means of an express provision from the shackles of the rule as at present formulated.

It is not surprising that the Commission found it necessary to dissociate itself from the view that superior orders are a sufficient justification. A rule of this nature, unless reduced to legitimate proportions, would in most cases result in almost automatic impunity in consequence of responsibility being shifted from one organ to another in the hierarchy of the State or its armed forces. If the rule as stated in the British and American military manuals actually represented the existing position in international law, the prospect of bringing to justice any substantial portion of offenders would indeed be slender.

The activity of the German *Reichsgericht* in the course of the Leipzig trials in 1921, in connection with the charges put forward by the Allied Powers against higher German officers, illustrates in an illuminating manner the true implications of an unqualified acceptance of the doctrine of superior orders. The person first on the British list of individuals whose prosecution for war crimes was demanded was Grand Admiral Tirpitz, Secretary of State of the German Navy between August 1914 and March 1916.[1] He was charged with having ordered unrestricted submarine warfare. The *Reichsgericht* quashed the proceedings on the ground that, in addition to the fact that unrestricted submarine warfare was not contrary to international law, the Grand Admiral was not responsible for the order in question. The *Reichsgericht* found also that that order was not given by Admiral von Capelle, who was Secretary of the Navy from March 1916 to July 1918; nor by Admiral Scheer, Commander of the Fleet from January 1916 to June 1918; nor by Admiral Hipper, Commander of the Fleet from August 1918 to November 1918; nor by Admiral Muller, Chief of the Naval Cabinet of the Emperor throughout the war—all of whom were on the list of accused persons. Who *did* give the order? The judgments of the *Reichsgericht* do not elucidate this point. But in the decision concerning Admiral von Hipper the *Reichsgericht* to some extent lifted the veil of discretion by stating that it was not the Chief of Fleet who was responsible for the order of unrestricted submarine warfare, but the Head of the Supreme Command of Naval Operations—presumably the Emperor himself. In view of this it is not surprising that the Supreme Court acquitted, as having acted under superior orders, individual naval commanders whom the British list charged "with sinking ships without warning in circumstances of unusual cruelty and inhumanity". If this interpretation of the plea of superior orders were to prevail, then it is clear that in many cases no one but the Head of the State, especially under a régime of absolutism or dictatorship, could be held responsible for decisions of major importance involving a breach of international law—a solution the futility of which is enhanced by the international irresponsibility, asserted by some, of the Head of the State.

The problem raised by the plea of superior orders is, by general admission, one of great complexity both in international and in municipal law. How intricate it is may be gauged from the fact that the solution adopted in the British and American military manuals with regard to war crimes is at variance with that in force in both countries in the domain of constitutional and criminal law. Moreover, the law on the subject in these and other countries in the field of municipal law is not free of ambiguities and apparent inconsistencies. In Great Britain and in the United States a soldier cannot validly adduce superior orders as a circumstance relieving him of liability for an illegal act. This is a rule established by a long series of decisions in both countries. On the other hand, according to English law, the soldier is bound to obey lawful orders of his superiors, and he is liable to punishment by the summary process of a court-martial in case of disobedience—though, when an order which on the face of it is lawful turns out to have been illegal, the soldier who obeyed it is answerable before ordinary courts if obedience to the order involved a crime. The difficulties resulting from the possible conflict between the duty of the soldier to obey orders[1] and his subjection to the general law of the land are appreciated by judges and writers, and sympathy is occasionally expressed with the predicament of the soldier who is thus subject to two possibly conflicting jurisdictions. But the major rule, although qualified in some decisions and although mitigated by the admitted right of executive remedial action in the form of the right of pardon, has remained intact.

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[1] The list, with a summary of the decisions of the *Reichsgericht*, is compiled in *Völkerrecht m Weltkrieg* (a report of the Commission of Enquiry set up by the German National Assembly in 1919, as to which, see below, p. 85), vol. IV (1927), pp. 337 et seq.

The fact is that the law—even military law—does not reduce the soldier to the status of a mere mechanism. While enjoining upon him obedience to orders, it adds the substantial qualification to the effect that obedience is due only to lawful orders. The law oscillates, with perhaps unavoidable hesitation, between the dictates of absolute discipline and efficiency in what is essentially an instrumentality of power and the equally inescapable subjection of that instrument of power to the authority of the law. The result is that in addition to the natural risks of his calling the soldier has, in theory, to face the dangers of a conflict between his duty of obedience to orders and his duty to obey the law. We say "in theory", for in fact the law does not ignore altogether the resulting difficulty. Numerous decisions of courts in the United States recognize that while, in principle, superior orders are not a valid defence, obedience to an order which is not on the face of it illegal and is within the scope of the superior officer, relieves the soldier of liability. Some State laws go even further in that direction. In England, where the courts have been loth to depart from the logical rigour of the established rule, it is generally recognized that the exercise of the right of pardon by the Executive is in such cases a proper remedy. As Dicey says: ". . . a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law."[1] And there are judicial decisions to the effect that the soldier obeying orders which are not "necessarily or manifestly illegal" will be protected by the courts themselves.[2]

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[1] For, it will be noted, according to English military law the soldier is bound to obey lawful commands only. The wording of Section 9 of the Army Act is explicit on the matter. The law on the subject has undergone significant changes. The Military Code of 1715 provided that "any officer or soldier who should refuse to obey the military orders of his superior officer" shall be liable to capital punishment. The Code contained no qualifications as to the lawfulness of the command. But in 1749 the wording of the Military Act was changed so as to render criminal disobedience to any *lawful* command. Judicial decisions show the same tendency. In *Sutton* v. *Johnstone* (1786, 1 T.R. 493, 546) we still find Lord Mansfield saying: "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey; nothing can excuse him but a physical impossibility." It will be noted that notwithstanding the apparent rigidity of this statement, there is no reference in this passage to the question of the *legality* of the order. In any case this pronouncement must now be read in the light of the express wording of statutory enactments like the Army Act and of subsequent decisions. Thus the case of *Warden* v. *Bailey* (1811, 4 Taunt. 67) is described in Chapter VIII of the Military Manual as discountenancing the duty of absolute obedience in a soldier enunciated in *Sutton* v. *Johnstone.* As pointed out, according to English military law the duty of obedience, far from being absolute, extends only to lawful orders. There is a significant passage on the subject in Stephen's *History of Criminal Law of England* (vol. I, pp. 205–6). He says: "The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior." It is probably accurate to say that no warrant can be found in British military law for the view that the existence of any duty of absolute obedience gives colour to an unqualified recognition of the plea of superior orders.

Conversely, many countries which, in the interest of the efficiency of their armed forces, have adopted the rule that obedience to superior orders excludes liability, make an exception in cases in which the orders are illegal. They, in turn, differ as to the necessary degree of the obviousness of the illegality. The German Code of Military Criminal Law, prior to the second World War, provided that the subordinate is liable to punishment as an accomplice if, when obeying an order, he knows that the act ordered involves a crime or misdemeanour.[3] According to the law of other states, the immunity of the soldier obeying orders ceases if he knows or *ought to have known* of the unlawful nature of the order.[4] There are indeed some states, in particular France, in which there is, apparently, no qualification to the rule that, in relation to the armed forces, superior orders are in all circumstances a valid excuse. Writers of authority, like Duguit, have defended that rule with vigour on the ground that it is indispensable to the cohesion and to the efficiency of the army.[5] But it has not been asserted that its effect is to relieve French nationals of responsibility when tried before foreign tribunals for violation of the municipal law of those countries or of international law even if the foreign country concerned has itself adopted an identical rule. For it is, by necessary implication, a rule applicable only to the State's own nationals and only in respect of its own municipal law. In fact, no country has more emphatically than France rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes.[6] It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes.

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[1] *The Law of the Constitution*, 8th ed. (1927), p. 302.

[2] Mr. Justice Willes in *Keighley* v. *Bell* (1866), 4 F. & F. 763, at p. 790.

[3] S. 42 (2).

[4] E.g., Article 3 of the Polish Military Penal Code of 1932.

[5] *Traité de droit constitutionnel* (2nd ed., 1923), vol. III, pp. 289, 290—while denying that superior orders offer a valid excuse in other spheres: *ibid.*, pp. 286–9.

[6] Mérignhac in *Revue générale de droit international public*, 24 (1917), p. 53. But see Nast, *ibid.*, 26 (1919), p. 123. The crucial *sedes materiae* in French law appears to be Article 64 of the Criminal Code according to which an act committed under duress (which, apparently, includes the case of a soldier bound to obey orders) is neither a crime nor a misdemeanour. Article 327 excludes liability in case of acts "ordonnés par la loi et commandés par l'autorité". So does Article 190. Articles 70 and 71 of the Belgian Penal Code reproduce substantially Articles 64 and 327 of the French Penal Code. Article 43 of the Dutch Criminal Code recognizes generally the defence of superior orders, while Article 40 lays down the general exception of duress. On the other hand, the Military Criminal Code of Czechoslovakia (which is in this respect based on the Austrian Military Penal Code of 1855) lays down, in Article 8, that, subject to the exceptions provided by the law, the order of a superior does not justify a crime or a misdemeanour. The exception is that of Article 158 relating to the duty to obey orders—unless such orders clearly aim at the commission of a crime or of a misdemeanour.

There is no international judicial authority on the subject, but writers on international law have almost universally rejected the doctrine of superior orders as an absolute justification of war crimes.[1]

In view of the substantial diversity, both apparent and real, in the judicial and legislative practice of various states, it is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability. In the first instance, there can be no liability, or there must be diminished liability, if the accused acted in the legitimate belief that he was proceeding in accordance with law, both municipal and international. In his estimate of the legal position, the circumstance that he has received orders to act in a certain way must be regarded, *prima facie*, as creating in the accused the conviction of the lawfulness of the action as ordered. By the same token, the clearly illegal nature of the order—illegal by reference to generally acknowledged principles of international law so identified with cogent dictates of humanity as to be obvious to any person of ordinary understanding—renders the fact of superior orders irrelevant.[2] Secondly, such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to immediate danger of death as the result of a refusal to obey an order excludes *pro tanto* the accountability of the accused—unless, indeed, we adopt the view, which cannot lightly be dismissed, that the person threatened with such summary punishment is not entitled to save his own life at the expense of the victim or, in particular, of many victims.[3] The result of the combination of these two principles will be, at the one end, that a person obeying an obviously unlawful order the refusal to obey which would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying, in an isolated case, an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of summary military discipline, may rely on the plea of superior orders. There will be a variety of intermediate situations between these two extremes.

There ought to be no doubt that should courts entrusted with the trial of war crimes disregard altogether the plea of superior orders, they would be adopting a course which could not be regarded as defensible. On the other hand, while the fact of superior orders sets a limit to the punishment of acts which might otherwise constitute war crimes, it need not warp the effectiveness of the law in a manner which may rightly be regarded as a perversion of justice. It will not cover crimes committed by superior authorities and officers acting under their own responsibility and initiative; it will not protect criminal acts committed by subordinates for purposes of private gain and lust; it will not shield acts committed in pursuance of orders so glaringly offending against fundamental conceptions of law and humanity as to remove them from the orbit of any possible justification, including that of immediate danger to the person charged with the execution of the orders; it will not excuse crimes committed in obedience to unlawful orders in circumstances in which the person executing the crime was not acting under the immediate impact of fear of drastic consequences of summary martial justice following upon a refusal to act (the latter being crimes perpetrated by the vast army of officials in the occupied territories). If these limits of the doctrine of superior orders are taken into consideration, then its judicious application, far from defeating the ends of justice, may testify in a significant manner to the determination of the victorious belligerent to abide by the limitations of international law.

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[1] For the literature on the subject see Oppenheim, *International Law*, vol. II (6th ed., 1940), p. 454, n. 2. See also Sack in *Law Quarterly Review*, 60 (1944), pp 63–8.

[2] This was clearly recognized by the German Supreme Court in 1921 in *The Llandovery Castle*, though it treated the fact of superior orders as an extenuating circumstance: *Annual Digest*, 1923–4, Case No. 232.

[3] *R.* v. *Dudley* (1884), 14 Q.B. 273.

(2) UNCERTAINTIES OF THE LAW OF WAR

Similar considerations apply to the second factor which must in some ways limit both the scope of prosecutions for war crimes and their punishment. That factor results from the controversial character of some of the most important aspects of modern war. There are acts of warfare which an impartial international tribunal would hold to be contrary to international law, but the lawfulness of which has been to a sufficient degree a subject of controversy or uncertainty to preclude them from properly being the subject of a criminal prosecution before the tribunals of the victorious belligerent. Thus, for instance, it appears probable that—apart, perhaps, from the doubtful operation of the law of reprisals—an international tribunal would hold that the methods adopted by Germany in both World Wars in the matter of mine-laying or general devastation were contrary to international law. Yet, because of the controversial state of international law on those matters, there may be lacking in respect of such acts that degree of *mens rea* which, in matters of this kind, constitutes an essential condition of criminality. Such acts as general devastation or indiscriminate mine-laying may supply ample reason for condemnation and protest; they may afford ground for retaliatory action of a most sweeping and comprehensive nature like the British Retaliatory Orders in Council of November 1939 and July 1940; they may, at the end of the war, justify the imposition of collective sanctions by way of compensation or otherwise as distinguished from individual penalties of a criminal nature. But criminal proceedings before the municipal courts of the victor may seem to many a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy.

Total war has altered the complexion of many a rule. At a time when the "scorched earth" policy, with regard to the belligerent's own territory, has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not properly form the subject-matter of a criminal indictment. Modern warfare has raised, and, in some respects, left unsolved the problem of reconciling the fundamental distinction between combatants and non-combatants with the advent of new weapons and with the increase of the numbers of both combatants and non-combatants engaged in work of vital importance for the war effort. This applies in particular to the question of aerial bombardment of centres of population. The ubiquity and indefiniteness, enhanced by elaborate camouflage and by the dangers of vastly improved methods of defence, of legitimate objectives; the difficulty of localizing the effects of bombardment; and bombing by way of retaliation—all these factors may make it difficult to answer the question of the legitimacy of aerial bombardment by way of criminal prosecutions against individuals. It is doubtful whether, in this and similar matters, tribunals entrusted with the task of punishing war criminals are a proper agency for solving controversial and difficult problems of the law of war. For this reason it is probable that retribution for much of the ravages of war, of loss of life, and of destruction of property perpetrated with a criminal intent may have to remain outside the scope of prosecution of individuals for war crimes before the courts of the former enemy. This does not mean that the guilty State will escape all the consequences of such actions committed on its behalf. There remains, in particular, the duty of compensation such as is envisaged in Article 3 of Hague Convention No. IV or in Article 25 of the so-called Hague Air Warfare Rules of 1923. Neither will any uncertainty of the law shield persons accused of clearly criminal acts unrelated to the major aspects of disputed rules, such as deliberate machine-gunning of civilian refugees or, possibly, such acts of mere terrorism and frightfulness as the bombardment of Rotterdam in April 1940.

Moreover, it does not appear that the difficulties arising out of any uncertainty as to the existing law have a direct bearing upon those violations of the rules of war which have provided the impetus for the almost universal insistence on the punishment of war crimes. Acts with regard to which prosecution of individuals for war crimes may appear improper owing to the disputed nature of the rules in question arise largely in connection with military, naval and air operations proper. No such reasonable degree of uncertainty exists as a rule in the matter of misdeeds committed in the course of military occupation of enemy territory. Here the unchallenged authority of a ruthless invader offers opportunities for crimes the heinousness of which is not attenuated by any possible appeal to military necessity, to the uncertainty of the law, or to the operation of reprisals.

The fact of the controversial character of some of the rules of war tends not only to impose a limitation upon the scope of offences which may properly be prosecuted as war crimes. It has a direct bearing on the question of the plea of superior orders. If it is true that, as pointed out above, the obviousness and the indisputability of the crime tend to eliminate one of the possible justifications of the plea of superior orders, then the controversial character of a particular rule of war adds weight to any appeal to superior orders. An international tribunal may find that the order was illegal. But any justifiable element of doubt, however ill-founded, preliminary to such a finding must weigh with particular force in the decision of the court to dismiss the plea of superior orders.

(3) THE EFFECT OF THE OPERATION OF REPRISALS

The same considerations apply, with even greater force, to the effect of the operation of reprisals—both in general and in relation to the plea of superior orders. In the first and in the second World War reprisals have been the legal cloak for the departure, some of which was unavoidable, from many of the accepted rules of warfare. In the sphere of maritime war the operation of reprisals in both World Wars has, in practice, replaced most of the traditional rules. In a sense, reprisals have often fulfilled the function which would normally have been left to agreement between States, namely, that of the adaptation of the law to the changed conditions of modern warfare. For this reason it is not always profitable to enquire whose original illegality opened wide the flood gates of retaliation. It is sufficient to note that the torrent swept away with devastating thoroughness many of the elaborate, though often controversial, rules.

A war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals. But, as a rule, an act committed in pursuance of reprisals, as limited by international law, cannot properly be treated as a war crime. A tribunal confronted with the plea of reprisals as a justification of the offence will be faced with a task of considerable difficulty. International law regulates, in a necessarily rough and indeterminate manner, the occasions for and the use of reprisals both in peace and in war. It postulates the requirements of a prior attempt at redress by negotiation, of proportionality, of reasonableness, of compliance with fundamental principles of war such as respect for the lives of non-combatants, and of due consideration for the legitimate interests of neutrals. But the law on the subject is necessarily elastic.

The element of reprisals may have a significant and perplexing bearing upon the plea of superior orders. It has been shown that the strength of the plea of superior orders is conditioned by the degree of heinousness of the offence and its approximation to a common crime apparently divorced both from belligerent necessity and from elementary considerations of humanity. But the force of this latter consideration may become considerably impaired —though never totally eliminated—when the act has been ordered, or represented to the subordinate as having been ordered, in pursuance of reprisals against a similar or identical crime committed by the adversary. The subordinate may be expected, when confronted with an order utterly and palpably contemptuous of law and humanity alike, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting though unavoidable test. But no such independence of conviction and action may invariably be expected in cases where the soldier or officer is confronted with a command ordering an act admittedly illegal and cruel but issued as a reprisal against the similarly reprehensible conduct of the adversary. We may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances alleged to have given rise to them. An example will illustrate the position: No person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who have surrendered at discretion. No person can be permitted to assert that, while persuaded of the utter illegality of killing prisoners of war, he had no option but to obey an order. But the situation is more complicated when the accused pleads not only an order, but the fact that the order was represented as a reprisal for the killing by the adversary of the prisoners of his own State. When the German Supreme Court in the case of *The Dover Castle* acquitted in 1921 the accused who pleaded guilty of torpedoing a British hospital ship, the Court expressed the view that the accused were entitled to hold, on the information supplied to them by their superiors, that the sinking of enemy hospital ships was a legitimate reprisal against the abuse of hospital ships by the enemy in violation of Hague Convention No. X.[1] Moreover, there is room for the view that if the victorious belligerent has himself, in pursuance of reprisals, set aside international law in a particular sphere, he cannot properly make such acts on the part of his opponent the subject of prosecution for a war crime.

On the other hand, as in the matter of the uncertainty of the law of warfare, the impact of the operation of reprisals is not as considerable as would appear at first sight. In particular, it does not seriously affect that most potent source of war crimes which originates in the lawlessness and the brutality of the occupying State.

While it is imperative that we should bear in mind the limitations upon the prosecution and punishment of war criminals—limitations such as those following from the plea of superior orders, from the controversial character of some of the laws of war, and from the application of reprisals—it is of equal importance that we should not in this matter lose sight of the wood for the trees. These exceptions may make the work of the tribunals more intricate and more responsible, but there is no reason to assume that they will invariably affect the issue. Superior orders may be invoked, uncertainties of the law of war may be relied upon, and reprisals may be cited as an excuse—but that does not mean that when thus appealed to they will confound the ends of justice. They will be subjected to judicial scrutiny. They may be found sufficiently weighty to warrant acquittal; they may be considered in the light of and as having the effect of extenuating circumstances; or they may, upon careful investigation, be brushed aside as a flimsy device to cover the horrors of a war crime. At the same time, it is clear that all these three factors imply a limitation upon the punishment of war crimes which cannot be disregarded consistently with the determination to conduct the trials of war criminals within the limits which law and justice impose.

In addition to the limitations which the absence of *mens rea* imposes, in various degrees, upon the right of punishing war crimes there must be considered the question as to what can properly be regarded as a war crime such as to warrant the demand for extradition or surrender to and punishment by the victorious belligerent. In particular, does every violation of a rule of warfare constitute a war crime? It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. The Commission on Responsibilities set up by the Paris Conference in 1919 included under the list of charges of war crimes such acts as "usurpation of sovereignty during military occupation", "attempts to denationalize the inhabitants of occupied territory", "confiscation of property", "exaction of illegitimate or exorbitant contributions and requisitions", "debasement of the currency and issue of spurious currency", "imposition of collective penalties", and "wanton destruction of religious, charitable, educational and historic buildings and monuments". In view of the comprehensiveness of this list it is in the nature of an anti-climax to note that the number of persons whose delivery the Allied States eventually demanded was inconsiderable.[1] It is possible that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences as adopted by the Conference and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term.

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[1] *Annual Digest*, 1923–4, Case No. 231.

In drawing up, in an exhaustive fashion, the list of war crimes the Paris Commission followed the somewhat academic treatment of the subject found in some of the manuals of military law. Thus the British *Manual*[2] adopts a vague and somewhat tautologous definition of "war crimes" as "the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture [*sic*] of the offenders".[3] These war crimes, according to the *Manual*, include, in particular, "violations of the recognized rules of warfare by members of the armed forces". Within that category the *Manual* enumerates the following as "the more important violations": making use of poisoned and otherwise forbidden arms and ammunition; killing of wounded; refusal of quarter; treacherous request of quarter; maltreatment of dead bodies on the battlefield; ill-treatment of prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; abuse of Red Cross flag and badge, and other violations of the Geneva Conventions; use of cvilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings; improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants of occupied territory.

The above enumeration is admittedly by way of example. In that order of thought, a more detailed list might include such violations of the rules of warfare as capturing enemy vessels employed in coast fisheries, or vessels charged with scientific or philanthropic missions; interference with mail boats or mailbags in breach of Hague Convention No. XI; unjustified destruction of enemy prizes; laying mines in breach of Hague Convention No. VIII; violation of such accepted rules of international law as exist in the matter of contraband and blockade; or the breach of any of the numerous and detailed provisions of the Geneva Convention of 1929 on the treatment of the sick and wounded and of prisoners of war.

It must be a matter for serious consideration to what extent an attempt to penalise by criminal prosecution at the hand of the victorious belligerent all and sundry breaches of the law of war may tend to blur the emphasis which must be placed on the punishment of war crimes proper in the limited sense of the term. These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity. There is room for the view that the punishment of war crimes by the victorious belligerent ought to be limited to offences of this nature—offences which, on any reasonable assumption, must be regarded as condemned by the common conscience of mankind. Suggestions for some such limitation will occasionally be found in textbooks. Hall, in his weighty and precise manner, expressed an opinion to this effect. Referring to the right of the belligerent of "punishing persons who have violated the laws of war, if they afterwards fall into his hands", he points out that no objection can be felt to the exercise of this right "so long as the belligerent confines himself to punishing breaches of universally acknowledged laws".[1] More recently, an able Italian writer, in a careful examination of the question, has suggested some such limitation.[2]

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[1] The list comprised eight hundred and ninety-seven persons.

[2] Following closely the section on "Punishment of War Crimes" in Oppenheim's *International Law*, vol. II, §§ 251 and 252.

[3] Chapter XIV, s. 441.

The task of defining, from this point of view, the scope of violations of the laws of war which ought to fall within the purview of punishment by the victorious belligerent is one of considerable difficulty. A seemingly administrative act of a political nature, like deportation or segregation of large sections of the population of the occupied territory, may, in its effects upon human life and in the cruelty of its execution, be indistinguishable from the common crime of deliberate murder. But it is a task which ought to be attempted. The result of the differentiation thus established between the two categories of violations of the law of war would not necessarily be to render immune from punishment or from the duty of compensation the less heinous manifestations of lawlessness. But these would be governed by a different procedure; in particular they would not fall within the purview of any demand for surrender as part of the armistice stipulations. On the other hand, it is probably unprofitable to attempt a distinction between the acts of the defeated State as such and acts attributable directly to individuals. All acts of the State are attributable to individual persons. There are none which cannot be traced to a decision of an individual or of a plurality of individuals. Neither is it helpful to establish a rigid distinction between offences against life and limb and those against property. Pillage, plunder and arbitrary destruction of private and public property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance. Finally, no just or working differential test can be found in the possibility of establishing a direct connection between the criminal act and any individual victim or victims. The person who issues general orders for the killing of hostages is no less guilty than the person to whom we may be able to bring home a specific order for shooting a particular hostage or group of hostages. A commander who issues a general order calculated to prevent the saving of life after the sinking of merchant vessels is no less guilty than an officer or soldier who is found to have committed on his own initiative a crime of this kind. Assuming that indiscriminate bombardment of towns for the purpose of terrorizing the civilian population and the deliberate machine-gunning of civilian refugees are to be treated as war crimes irrespective of the plea of superior orders, the mere fact that an individual formed part of a bombing squadron responsible for such acts may be sufficient to stamp him as a war criminal although it is impossible to prove a direct connection between his conduct and the death of any individual person. Some legal systems recognize that when a group of persons, such as a gang of robbers, commit a crime, each and every member of the group may be convicted without proving that any particular member committed the criminal act.

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[1] *International Law*, 3rd ed. (1883), s. 135.

[2] Balladore Pallieri, *La Guerra* (1935), p. 385.

IV. *Safeguards of Impartiality and of Legal Equality in the Trial of War Criminals*

It is incumbent upon the victorious belligerent intent upon the maintenance and the restoration of international law, to make it abundantly clear by his actions that his claim to inflict punishment on war criminals is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigours of a newly created rule. The persuasive force of any such professions must be impaired unless it is accompanied by the provision of safeguards of impartiality and by a measure of equality in the application of the law. The preservation both of the substance and of the appearance of impartiality is of particular importance in view of the fact that, in the circumstances of the situation, there cannot be any question of formal equality by a concession to the defeated belligerent of the identical right to punish any war criminals of the victor. Under existing international law this is in no way a condition of the valid exercise of that right by the victorious belligerent. Even in this respect, there may be means for mitigating the inequality fully authorized by the existing law.[1]

However, the most important aspect of the problem is that of guarantees of impartiality in the punishment of war crimes. These guarantees may, in theory, be achieved in three ways: I. By means of an International Criminal Court; II. By way of appropriate modifications of the organization of the municipal courts of the victorious belligerents adjudicating upon war crimes; III. By a system of quasi-international courts conceived as municipal courts of the belligerent the composition of which is not confined to its own nationals.[2]

I. *The International Criminal Court.* The problem of an International Criminal Court, in particular with reference to the punishment of war crimes, has been an almost continuous subject of discussion since the first World War. Not all of the reasons which have been adduced against the establishment of a court of this nature can be described as sound. This applies in particular to the objection based on the difficulty of reaching an agreement as to the law to be applied by it. In principle, there appear to be compelling reasons for the establishment in the future of an International Criminal Court having jurisdiction to try the crime of war (i.e. resort to war in violation of international law[1]) as well as certain categories of war crimes arising out of the conduct of hostilities proper and not involving common crimes against life and property. The jurisdiction over the latter, especially when committed in occupied territory, would seem more properly to lie within the province of local tribunals suitably reinforced by an international and neutral element acting expeditiously and having direct access to available evidence. However, regardless of the feasibility of establishing an International Criminal Court in the future, weight must be given to the following considerations of a practical nature:

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[1] See below, p. 82.

[2] For a detailed discussion of the various types of court to try war criminals see Glueck in *Harvard Law Review*, 56 (1942–3), pp. 1059–89. See also the judicious suggestions by Professor Hyde in *Proceedings of the American Society of International Law*, 1943, pp. 43–6.

(i) The establishment of an international institution of a novel character and of the scope and significance of an International Criminal Court is not a task which can be accomplished within a short period. At the same time there are compelling reasons which make it undesirable and impracticable to postpone the punishment of war crimes for any prolonged period of years. It follows that, unless an International Criminal Court is already in existence at the time of the cessation of hostilities, those who link up the punishment of all war crimes with the establishment of such a court run the danger of sacrificing the substance of an urgent task for what may well prove to be the shadow of its intricate machinery.

(ii) In so far as the primary purpose of the establishment of an International Criminal Court is to secure an unimpeachable measure of impartiality, that purpose must be viewed in the light of the contingency, such as will arise at the termination of the second World War, that the world may be divided, with insignificant exceptions, into two opposing camps of belligerents. In such circumstances an International Criminal Court would hardly partake of the character of an impartial and detached judicial body. This is also a contingency which must be taken into consideration in connection with any war involving the great majority of states. No "international" court in any true sense of the word is possible in such cases.

(iii) For the same reasons no adequate solution can be found in the establishment of an international tribunal composed of neutral judges or, generally, in giving neutral States a major share in the proceedings. There may be only a very few neutral states left. Some of them may be only nominally neutral. They may have identified themselves for many purposes with the cause or the outlook of one side. In a general war in which the overwhelming majority of States is animated by the consciousness that their cause is one of vindication and of survival of law and civilization, there will be a tendency to view at least some of the remaining neutral States as having shown themselves deficient in their sense of international solidarity at a supreme period of trial.

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[1] In this matter the position is now different from that which obtained in 1914 and which prompted the Commission on Responsibilities set up in 1919 by the Paris Conference to declare that "by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commissions of Enquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law". The law of any international society worthy of the name must reject with reprobation the view that between nations there can be no aggression calling for punishment. It must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of War as lying within the sphere of criminal law.

II. *Means for Securing Impartiality within the Framework of Municipal Tribunals.* If the establishment of an International Criminal Court is not an adequate instrument for securing the requisite degree of impartiality in the trial of war criminals, there arises the further question as to the possible safeguards on that behalf within the framework of the municipal courts of the victorious belligerent. The following are believed to deserve consideration:

(i) *Jurisdiction of Special Courts Composed of Professional Judges with the Participation of Military Assessors or Judges.* Some such composition of tribunals for the trial of war criminals, while not interfering seriously with their efficiency, would add to their authority and remove from them the reproach of a purely summary procedure. Exclusively military jurisdiction is fully justified during the actual hostilities. The justification is less obvious after the cessation of hostilities in respect of persons not captured in the course of military operations but surrendered by the enemy or neutral States after the conclusion of the armistice.

(ii) *The Expansion of Military Tribunals by the Inclusion of Lay Judges.* There is no compelling reason to assume that the result of some such expedient would be a serious impairment of the speed of the trials. There are weighty reasons for disposing of the trials of war criminals in the period between the armistice and the peace treaty, but it is doubtful whether this implies the necessity for anything in the nature of a summary procedure. The state of popular feeling in the period immediately following the armistice and the legal difficulties likely to be involved in some of the prosecutions may require that purely military courts should be reinforced by the inclusion of persons of judicial experience and possessing a wider knowledge of the law.

(iii) *Participation of Neutral Assessors.* Subject to what has been said above concerning the position of neutral States at the end of hostilities, there is a strong case for associating neutral assessors with the trial of war criminals. Neutral assessors might be given the right to participate actively in the trial by addressing questions to witnesses and to the accused, by being present at the deliberations of the court, and by being entitled to express concurrence with or dissent from its decision. It might be found possible to attach practical consequences to any dissent on their part, for instance, by way of granting to the accused a right of appeal in such cases.

(iv) *Participation of Enemy Assessors.* The attempt to secure not only the substance but also the forms of impartiality and of equality before the law need not stop at this point. There is force in the view that the defeated enemy should be given the opportunity, by providing assessors of his own, of participating in the work of the courts of his adversary engaged in trying war criminals. In particular, it must be considered whether, in the case of the participation of both neutral and enemy assessors, a judgment from which they have both dissented should not automatically be liable to review by a superior court regardless of any appeal by the accused.

III. *Quasi-international Courts of Appeal and Courts of First Instance.* Quasi-international tribunals are, in this connection, municipal tribunals of the victorious belligerent enlarged by the inclusion of judges from other countries, co-belligerent and neutral. This is a machinery particularly suitable for any appellate jurisdiction which may be set up. There may be obvious advantages from the point of view of justice and expediency in providing appellate courts which, while acting with all requisite expedition, would be in a position to bring to bear upon the cases before them a higher degree of detachment and a wider range of legal knowledge. Quasi-international courts thus set up might prove to a large extent a substitute for an International Criminal Court adjudicating upon war crimes. The presence of judges of foreign nationality, while not calculated decisively to influence the issue and while in no way derogating from the authority or reputation for impartiality of the national courts, would add to their proceedings the indispensable elements of publicity and detachment.

In considering these and similar safeguards it is necessary to bear in mind the fact that the due punishment of war criminals, unless it is accompanied by all practicable safeguards of impartiality and, to some extent, of mutuality, may be deficient both in effectiveness and in the part which it might otherwise play in the re-establishment of international law. Such proposals may be severely criticized by those who may see in them legalistic attempts to interfere with the just rigour of retribution; they may be adversely commented upon by others as not going far enough in preventing the punishment of war crimes from becoming a one-sided weapon of revenge wielded by the victors. In any case they must be studied in the light of the situation brought about by the victory of one of the belligerents able to impose upon the defeated enemy the surrender of war criminals. In a situation like this there can be no such degree of mutuality as alone would satisfy the purist, namely, the delivery to the defeated States of nationals of the victorious belligerents accused of having perpetrated war crimes. But even here there is room for a consideration of measures likely to ensure some approximation to equality. The victorious belligerent may openly proclaim his determination to investigate and to bring to trial any charges of violations of the law of war committed by his armed forces; he may give full publicity to the resulting judicial proceedings; he may offer to invite neutral or enemy participation in any procedure that may be adopted. Thus while taking steps towards ensuring an impartial trial of enemy nationals accused of war crimes, the victorious belligerents would at the same time do much to meet the reproach that justice has overtaken only the criminals among the defeated and not those among the victors. True statesmanship ought not to give any justifiable and avoidable excuse for any such reproach. Strengthened by the consciousness that he has gone to the extreme practicable limit of securing impartiality and equality before the law, the victorious belligerent will be in a position to disregard the charge that, amidst a sanctimonious claim to virtue, he has combined the rôles of party and judge. In addition, he will be entitled to insist that, as a matter both of probability and of experience, the impartiality of the courts of the defeated State cannot be assumed. This is so not because the courts of the victorious belligerent are intrinsically entitled to a higher claim to excellence and impartiality. The reason is that the courts of the defeated State must, in the circumstances, act under the impact of bitter national resentment and hostility unredeemed by such magnanimity and foresight as the victor may be able to afford.

This latter consideration merits special emphasis. It may be usefully illustrated by reference to the activity of German courts which, in 1923 and 1924, were called upon to conduct the trial of German nationals accused of war crimes. German writers have repeatedly asserted that the German Supreme Court which tried the accused persons displayed a high degree of conscientiousness and impartiality. It is doubtful in the extreme whether that claim can be substantiated. Of the 901 cases which came before the Supreme Court, only thirteen ended in the condemnation and conviction of the accused. In those few cases the Supreme Court found the accused guilty of such crimes as maltreatment of prisoners of war[1] and firing on the boats of survivors from hospital ships sunk by a submarine.[2] The Court inflicted relatively mild sentences of imprisonment. In 692 cases the Court came to the conclusion that there were no legal grounds justifying the continuation of proceedings. In a considerable number of cases relating to maltreatment of prisoners of war the Court found that the accused, far from having been guilty of the charges, had gone out of their way to treat the prisoners with special consideration. The doctrine of superior orders and the plea of military necessity were elevated to paramount legal principles—a line of conduct which the Supreme Court pursued in subsequent years in connection with the interpretation of the Hague Regulations[3] and with attempts to punish for high treason German nationals accused of denouncing to the Allied Powers the violations by Germany of her obligations in the matter of disarmament under the clauses of the Treaty of Versailles.[4]

Neither, in the light of experience, are we in a position to place reliance upon the findings of any special commission of investigation instituted by a legislative body of the defeated State, however democratically constituted. In August 1919 there was set up, as part of a general committee on war responsibilities appointed by the German *Reichstag*, a sub-committee to investigate the charges of violations of the laws of war committed by both Germany and her allies. The Commission, whose work was largely under the direction of Professor Schücking, a distinguished international lawyer and subsequently one of the Judges of the Permanent Court of International Justice, produced a series of reports published in 1927 in five volumes under the title *Völkerrecht im Weltkrieg*. A study of these volumes permits the conclusion that the Commission did not exhibit a degree of detachment higher than that displayed by the Supreme Court. It exonerated Germany from the major charges of lawlessness and levelled grave accusations against the Allied Powers.

In the matter of charges of ruthlessness and terrorism in the course of the occupation of Belgium, the Commission accepted as proven the fact that there was waged a popular war (*Volkskrieg*) against the German forces and that there existed, accordingly, full justification for the resulting acts of suppression. In this connection Professor Meurer, the principal *rapporteur* of the Commission, justified the indiscriminate killing of hostages. He said: "In war every one is a sacrificial lamb. What appears to be humane is, from a higher standpoint, often the most inhumane. Is it not the innocent soldier who falls victim to the war crime on the part of the inhabitant, and is not the killing of hostages meant to prevent this? . . . The commander who wishes to be humane may in fact prove very inhumane in relation to the soldiers entrusted to him and thus incur a grave responsibility."[1] The Commission had no difficulty in holding that the "dragging" (*Verschleppung*) by the French authorities of the inhabitants of the occupied parts of Alsace and Lorraine to France at the outbreak of war was contrary to international law.[2] But it expressed the considered view that the German decree of October 28, 1916, by virtue of which "unemployed Belgian workmen who, after they had refused to accept work offered to them in Germany and, as the result, had become a charge upon public resources, were compulsorily transported to Germany in order to be provided with employment, was in accordance with Article 43 of the Hague Regulations and with international law at a time where there was not sufficient employment in Belgium and when that measure seemed to be urgently required for the restoration and maintenance of public order and public life." The Commission had no doubt that these measures were not inconsistent with Articles 46 and 52 of the Hague Regulations which guarantee the rights of inhabitants, seeing that military requirements are paramount and that the maintenance of public order and public life are a military necessity.[3] The *Reichsgericht* had previously decided, in the course of criminal proceedings against Field-Marshal Hindenburg in respect of this charge, that his action was lawful.

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[1] The *Muller* and *Neumann* cases, Cmd. 1422, pp. 26, 36.

[2] *The Llandovery Castle*, *ibid.*, p. 45.

[3] Thus in a case decided in November 1924, the German *Reichsgericht* held that the requisition by Germany of machines in occupied Belgium and their subsequent sale to private manufacturers was legitimate although contrary to the Hague Regulations. For these, in the view of the Court, left intact the principle that a State's right of self-preservation has precedence over international treaties (*Annual Digest*, 1923–4, Case No. 230).

[4] The *Reichsgericht* rejected the view that the conviction of the accused would violate the rule of international law which prescribes that treaties must be fulfilled in good faith. For that principle, in the view of the Court, binds only the contracting party and not individuals. (March 14, 1939: *Annual Digest*, 1927–8, Case No. 5).

With respect to the use of poison gas by the German armies, the Commission agreed that artillery projectiles containing such gases were first used by the German armies. But it declined to see in that practice a violation of the prohibition, contained in the Hague Declaration of 1899, "of the use of projectiles the sole object of which is the diffusion of asphyxiating and deleterious gases" on the ground that this was not the "sole object" of the explosives launched by the German artillery.[4] Neither, in the view of the Commission, was the use of these projectiles contrary to the prohibition, laid down in Article 23 (*a*) and (*e*) of the Hague Regulations, of the use of poison and poisoned weapons on the ground that these did not include poison gas. At the same time the Commission found that the French army was equipped with and first used weapons clearly prohibited by the Hague Declaration and the Hague Regulations, and that the subsequent use of the gas weapon by Germany was justified as a measure of reprisals. In the matter of air warfare, and in particular of air bombardment, the conclusion of the Commission was that the rules of international law on the subject had been violated not by Germany but by the Allied Powers.[5] The conduct of unrestricted submarine warfare by Germany was declared to have been in accordance with international law as a legitimate measure of reprisals against the unlawful blockade proclaimed by the Allies.[1]

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[1] *Das Völkerrecht im Weltkrieg*, vol. II, p. 221.

[2] *Ibid.*, vol. I, pp. 167–85.

[3] *Ibid.*, vol. I, p. 193.

[4] *Ibid.*, vol. IV, pp. 7–9, 39–42.

[5] *Ibid.*, vol. IV, p. 53.

Occasionally, it was only after a circuitous legal argument that the Commission arrived at a conclusion favourable to Germany. Thus with regard to Article 23 (*g*) of the Hague Regulations which prohibited "belligerents to destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of the war", the Commission agreed that that article lent itself both to a restricted and to a wide interpretation. "Necessities of war" could mean either imperative military necessity directly connected with offensive or defensive action, or, generally, any military advantage accruing from devastation. The Commission expressed the view that the restricted interpretation was to be preferred. However, in a curious *non sequitur*, it proceeded to state that for the purposes of the investigation it was sufficient if it was satisfied that the military authorities in question considered in good faith military necessity to be involved: "The Commission could not safely undertake a technical review of military necessity." Having gone thus far, it had no difficulty in considering as legitimate the general devastation effected by the German army at the time of the retreat in 1917 to the so-called Siegfried line; the devastation during the retreat in 1918; and the destruction of the mines in Northern France and Belgium.[2] As a rule, however, the Commission avoided the appearance of undue restraint. With regard to the action of the Allied Powers in Greece it put on record its conclusion that "there was hardly a rule of neutrality which had not been flagrantly violated by the Entente".[3] The Commission entertained no doubts as to its own impartiality. It described its work as an "historic innovation, seeing that never before had a parliamentary organ undertaken the task of pronouncing, exclusively by reference to international law, legal judgment on events and measures".[4]

The above record of the German Supreme Court and of the Commission on Violations of the Laws of War throws light on the prospects of impartial application of international law by the courts and other agencies of a defeated State. It is a much-needed reminder of the fact that the cause of impartial justice may be served in ways other than a mechanical equality in procedure. It cannot in any way be interpreted as justifying the victorious belligerent in adopting methods summary in their nature and deficient in the essential safeguards of orderly judicial process and, within the limits dictated by circumstances, of a minimum measure of reciprocity.

V. *Surrender from Neutral States*

The provision of safeguards of impartiality and of other essential requirements of judicial procedure in the prosecution and trial of war criminals is directly relevant to the question of any duty of neutral States to refuse admission to or to surrender to the victorious belligerent persons accused of war crimes. For should the neutral State have reasonable ground to assume that a prosecution in respect of which surrender is requested is of a political character by virtue either of the nature of the alleged offence or of the

[1] *Ibid.*, vol. IV, p. 113.

[2] *Ibid.*, vol. I, pp. 61–4.

[3] *Ibid.*, vol. II, p. 16.

[4] *Ibid.*, vol. I, p. 6.

absence of normal judicial safeguards of fair trial,[1] then in granting asylum and in insisting on maintaining it it may, it is submitted, be deemed to rely on the established principle of asylum for political offences. That principle, whatever may be its legal nature or extent, cannot accurately be denied a place in existing international law. This is one of the reasons why the question of admission of war criminals to and their surrender from neutral states cannot be exhaustively answered by the proposition that such persons have no right to asylum.[2] The implications of that proposition seem to be of some difficulty and must be considered in relation to admission, to extradition and to other forms of surrender.

The statement that there is no individual right of asylum is probably unimpeachable when viewed as a matter of admission of persons to the territory in which they claim asylum. It requires further consideration when looked at from the point of view of extradition. In this respect we must distinguish between any right of the individual under municipal and under international law. In some countries, like Great Britain and the United States, a person, once admitted, may be said, in respect of extradition, to have an individual right of asylum in two senses: in the first instance, in the absence of an extradition treaty he cannot be extradited. It is a rule of the common law that the Executive cannot hand over a person to a foreign jurisdiction unless in pursuance of a statute.[3] In these countries, statutory law makes extradition dependent upon the existence of a treaty of extradition with the foreign Power concerned. Secondly, by statute, a fugitive who is charged with a political offence or whose extradition has in fact been requested with the intention of trying him for a political offence,[4] cannot be extradited. In other countries—like Sweden, Switzerland, and Turkey[5]—a person can be extradited regardless of the existence of an extradition treaty, but not in respect of political offences. In these countries the fugitive may still be said to possess, under municipal law, a right of asylum so far as political offences are concerned.

To what extent can it be said that there is a right of asylum under international law? It is difficult to reject with emphasis the view that there is such a right in respect of political offences—though, having regard to the procedural incapacity of the individual in the international sphere, it is even more difficult to assert its existence. However, apart from the latter limitation, we are confronted with the impressive fact that in the legislation of modern states there are few principles so universally adopted as that of non-extradition of political offenders. This being so, can we not maintain that the principle has become one of those "general principles of law recognized by civilized states" which Article 38 of the Statute of the Permanent Court of International Justice has elevated to the authority of a source of international law?[1] The question may properly be raised although, in the context, it is largely theoretical for the reason that, as will be pointed out presently, war criminals are not, as a rule, political offenders.

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[1] The close connection between non-extradition for political offences and the proper trial of the accused may be gauged from the fact that some States decline extradition if it is proved that it is intended to try the accused before an extraordinary tribunal: see, e.g., Article 9 of the Swiss Extradition Law.

[2] A proposition cogently expressed by Lord Simon, the Lord Chancellor, in his speech on 7 October 1942. He said: "There is not, as many people suppose, any private right, recognized in International Law, called the right of asylum. That is to say, the fugitive—the criminal—who manages to get over the border into some other country, is not thereby by International Law entitled to claim to stay there. . . . It is perfectly competent for the country which receives the criminal, whether there is an extradition treaty or not, if that country thinks that it will be fulfilling its duty to the world, or if its conception of public policy requires or justifies it, to hand the criminal over": *Parl. Debates*, House of Lords, vol. 124, p. 582. For a qualification of the latter statement see below, p. 88. See also Moore, *Digest of International Law*, vol. II, § 291, on the laxity in the use of the term "right of asylum". And see Resolution of the Swiss Federal Council of 23 March 1921 (cited by Schlesinger in *Columbia Law Review*, 43 (1943), p. 964): "L'étranger n'a pas droit à l'asile. L'Etat a simplement la faculté, en vertu de sa souveraineté, d'admettre sur son territoire un étranger, et il prononce en toute liberté."

[3] For an emphatic affirmation of this rule see *Valentine* v. *United States* (1936) 299 U.S. 5.

[4] See s. 3 (1) of the Extradition Act, 1870.

[5] See below, p. 89, n. 2.

Once we have reduced to its true proportions the question of the individual right to asylum, we may inquire into the legal grounds on which the victorious[2] belligerent can base his claim for the surrender of enemy war criminals who have taken refuge in neutral territory. That legal basis is provided, in the first instance, by the existing extradition treaties between the neutral State and the belligerent. These cover primarily, though not exclusively, offences committed in such parts of the territory of the requesting State as were occupied by the enemy. Thus, for instance, war crimes committed during the second World War in Russia by members of the German army of occupation and German officials who have taken refuge in Sweden will be covered by any extradition treaty in force between Russia and Sweden. Probably, if we take into account the locality of the causation (or of the origin) of the injurious action as distinguished from the locality of its effect, the treaty will cover orders issued in Germany and taking effect in Russia. There are impressive judicial authoritative pronouncements in the national and international sphere asserting some such extension of the territorial principle.[1] Thus, while the provisions of the extradition treaties in existence between neutral states and the belligerent must be studied in detail in relation to any concrete situation, it is clear that they are likely to cover most of the possible war crimes both *ratione loci* and *ratione materiae*. They will cover, *ratione loci*, acts committed in such parts of the territory of the requesting State as were under enemy occupation; acts in or from the air over the territory of the requesting State and having effect in its territory; acts, wherever committed, having effect on what is constructively State territory, namely, vessels flying the flag of the belligerent;[2] and, probably, acts ordered by persons present in enemy territory but having effect in the territory of the belligerent requesting extradition. They will include, *ratione*

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[1] Suppose State A surrenders to State B a national of State C on a charge of having committed a political offence. The alleged offender clearly has no enforceable right under international law. But can his State complain that State A has violated an established principle of international law? Has the principle of non-extradition of political offenders crystallized into a customary rule of international law? In *Fiscal* v. *Samper*, decided in 1934, the Spanish Supreme Court held that "delinquents who take refuge in a foreign country relying on legislation which promises them protection have acquired a true right, disregard of which would tend to weaken the law of nations and to introduce lack of confidence into international relations": *Annual Digest*, 1938–40, Case No. 152.

[2] The problem, it will be noted, does not arise as between the defeated belligerent and neutral states. The former, even if it were not prevented from doing so by the terms of the peace treaty, will have no occasion for requesting the surrender of the war criminals of the victorious belligerent. These will not find it necessary to take refuge in neutral territory.

[1] See the authorities surveyed in the Dissenting Opinion of Judge Moore in *The Lotus* case, Permanent Court of International Justice, Series A, No. 10, pp. 73–83.

[2] See, for a clear statement of the underlying principle, Moore, *Extradition* (1891), § 104.

materiae, the common crimes usually enumerated in extradition treaties like murder, assassination, manslaughter, wilful assault resulting in death or permanent disablement, rape, false imprisonment, crimes against personal liberty, robbery, and so on. Most of the illegalities perpetrated in occupied territory can be reduced to crimes such as those enumerated above.

Moreover, the limitation of extraditable offences to those committed within the territory of the requesting State is not an invariable feature of extradition treaties.[1] It is therefore possible that the extradition treaty between the belligerent and the neutral may cover offences committed in the territory of the defeated belligerent.

Although it is only the existence of an extradition treaty which entitles the victorious belligerent to insist on extradition as a matter of strict legal right, the municipal law of most states permits the granting of extradition irrespective of treaty—usually on the assurance of reciprocity or, occasionally, as a matter of international solidarity in the suppression of crime.[2] In so far as it is permissible to speak of principles of international law in the matter of extradition, there is therefore no principle which requires the existence of a treaty as a condition of extradition or which prevents a State whose municipal law has hitherto been based on that requirement from abandoning it when necessary. If it attaches importance to its maintenance and if no valid extradition treaty exists between the neutral State and the victorious belligerent, it may still be open to and proper for the former to conclude an extradition treaty on traditional lines and subject to the accepted safeguards in the matter of political offences. A treaty so concluded and covering acts committed prior to its conclusion would in no way amount to an introduction of the reprehensible principle of retroactivity in the sphere of criminal law. There is high authority in support of that view.[1] A treaty thus concluded would not convert into a crime acts which hitherto had been blameless. It would not constitute an abandonment of the principle of political asylum properly conceived. It would testify to the recognition on the part of the neutral State of its moral duty to co-operate in the maintenance of international law and in the international suppression of crime whether committed under the guise of war or otherwise.

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[1] For numerous examples of treaties in which this is not the case see *Harvard Research in International Law, Extradition* (1935), pp. 92, 93. See also *In re Amper*, decided by the Italian Court of Cassation, for an emphatic refusal to admit the relevance of "questions of territorial jurisdiction if its own jurisdiction is not involved": *Annual Digest*, 1933–4, Case No. 149.

[2] Article 1 of the Swiss Law on Extradition of 22 January 1892 provides for extradition "on the condition of reciprocity [not necessarily through an extradition treaty], or, as an exception, even without that condition." The same article lays down that extradition may be granted for an offence not envisaged in the treaty (*Harvard Research, Extradition*, p. 420). Similarly, the Swedish Extradition Law of 4 June 1913 provides, in Article I, that extradition may be granted in the absence of an extradition treaty if the requesting State promises reciprocity (*ibid.*, p. 414). The position in Turkey is similar (*ibid.*, p. 428). The German Extradition Law of 23 December 1929 merely requires reciprocity (*ibid.*, p. 385). So does the Argentinian Extradition Law of 25 August, 1885 (*ibid.*, p. 356). The French Extradition Law of 10 March 1927 is to the same effect: see *Decerf's Case, Annual Digest*, 1935–7, Case No. 164. In *In re Vilca* the Supreme Court of Chile decided, notwithstanding the absence of an extradition treaty, to ask for the extradition of the accused from Peru on the ground that the crime (homicide) with which he was charged was "in the nature of a serious crime against humanity" and that "these are circumstances in which extradition of fugitives is proper, according to rules of public international law uniformly accepted by both States": *ibid.*, 1931–2, Case No. 156. In *In re Fernando Benet* the Federal Court of Venezuela, while denying, in the absence of a treaty, extradition on the charge of embezzlement, admitted that "it was a generally admitted doctrine of Public International Law that crimes for which extradition must be granted [in the absence of a treaty] are crimes of a serious character and grave consequences constituting an equal danger to all nations": *ibid.*, 1925–6, Case No. 225. See also, to the same effect, *In re Diogenes Gonzalez*, *ibid.*, Case No. 226. For other examples of extradition notwithstanding the absence of a treaty see *In re Doelitzsch* (decision of the Italian Court of Cassation), *ibid.*, 1923–4, Case No. 156, and *In re Tsiaras* (a decision of the Roumanian Court of Cassation), *ibid.*, 1929–30, Case No. 173.

Assuming that the offence is otherwise covered by a treaty of extradition or that extradition can be effected without an extradition treaty, to what extent does the principle of non-extradition of political offenders—a venerable principle of impressive universality—exclude the duty of surrender of persons accused of war crimes? This question is of paramount importance, for no demand for extradition from neutral states is likely—or ought—to succeed if it is contrary to the principle of non-extradition of political offenders. On the other hand, the very sanctity of that principle requires that it should not be abused for sheltering persons who, behind the screen of war, have been responsible for common crimes which have outraged civilized mankind.

The law of extradition as applied by municipal courts provides a useful and necessary corrective to the view that any act having a political complexion is a political act for the purposes of extradition. The conception of a political crime has a definite meaning in the law of extradition. A political crime is, in the first instance, one committed in the attempt to substitute one government for another or one form of government for another. Courts, including German courts, have attached decisive importance to that distinguishing feature of political crimes. Crimes committed by anarchists opposing all government;[2] crimes perpetrated as an act of political revenge;[3] crimes committed for motives of patriotism but unrelated to any attempt to change the government or the form thereof[4]—all these have been held by the highest municipal tribunals not to come within the category of political crimes protected from extradition. Municipal courts have long discarded the idea that the mere absence of a motive of personal gain is sufficient to impart to an offence the character of a political crime.[5] In the legislation of some countries, as, for instance, in the Belgian *attentat* clause, the predominance of particularly objectionable features of a common crime has sufficed to divest the offence of the otherwise clearly discernible complexion of a political offence.

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[1] See, for instance, *United States* v. *Hecht*, decided in 1927 by the United States Circuit Court of Appeals, where the court held not only that extradition treaties cover offences committed prior to their conclusion, but also that there is nothing to prevent a contracting party from recognizing "somewhat belatedly . . . as criminal a well-known fact of commercial immorality": *Annual Digest*, 1927–8, Case No. 234. And see Hackworth, *Digest of Internationa7 Law*, vol. IV (1942), p. 36. See also to the same effect the Swiss Law of Extradition ref erred to above, n. 2, page 89, and Articles 5 of the Japanese Extradition Law of 1895 (*Harvarp Research, Extradition*, p. 411).

[2] *In re Meunier* [1894] 2 Q.B. 415; *In re Kaphengst*, decided in 1930 by the Swiss Federal Court, *Annual Digest*, 1929–30, Case No. 189.

[3] *Pavan Case*, decided in 1928 by the Swiss Federal Court, *ibid.*, 1927–8, Case No. 239; *In re Richard Eckerman*, decided in 1929 by the Supreme Court of Guatemala, *ibid.*, Case No. 189.

[4] *Noblot Case*, decided in 1928 by the Swiss Federal Court, *ibid.*, Case No. 240.

[5] There is an interesting analogy between this development and the more recent practice of states which refuses to treat *animus furandi* as the decisive characteristic of piracy.

It is probable that the conception of a political crime as limited to acts aiming at a change in the government or in the form thereof, does not exhaust all possible connotations of a political offence—although this is the usual meaning of political crimes as interpreted by courts in connection with extradition treaties.[1] In particular, it is clear that political offences must be deemed to cover all acts of treason in its wider sense, including treason committed during war by joining or assisting the enemy.[2] In connection with war crimes it is submitted that the notion of a political offence must be deemed to cover, in particular, the following three categories: (1) persons upon whom the victorious belligerent intends to wreak his vengeance for the sole reason that they participated in a war waged against him; (2) persons accused of such violations of the law of war as do not on the face of it amount to a common crime against individuals or property; (3) persons accused of acts whose criminality is subject to legitimate dispute for the reason either of the controversial nature of the rules of war in question or of their having been committed by one or both sides in the course of reprisals. Thus, for instance, if extradition were asked for in respect of the crime of initiating the war in violation of the General Treaty for the Renunciation of War; if it were requested in connection with the charge of commencing the war in disregard of Hague Convention No. III providing for a declaration of war; if it were insisted on in respect of a decision on military policy in the conduct of war like the ordering of general devastation, or the abuse of a flag of truce; if it were demanded on account of requisitions and contributions contrary to the Hague Convention; or even, to adduce an extreme and controversial example, if extradition were requested of persons accused of sinking merchant vessels without warning—in all these cases there is room for asserting that they come within the general notion of political crime.

On the other hand, acts which *per se* constitute common crimes and which are contrary to rules of war cannot legitimately be assimilated to political offences. The fact that certain acts, otherwise criminal, like taking of life or causing bodily injury, are committed in pursuance of lawful warfare, deprives them of the stigma of criminality according to common law and renders them, in a certain sense, political. But once it has been established that such acts have been perpetrated in violation of the rules of lawful warfare, there vanishes the decisive factor which lifts them above the reprobation of common criminality.

Undoubtedly the border-line between lawful and unlawful acts of war is often a shadowy one, and to that extent the neutral State may deem itself entitled to considerable latitude in granting or refusing extradition. But the discretion wielded by the executive and judicial authorities of the neutral State must be exercised in good faith. Should the neutral State or its courts adopt a general policy of non-extradition in the matter of war crimes on the ground that they are political, the belligerent asking for extradition would, it is believed, be confronted *prima facie* with a breach of any existing extradition treaty. Should that happen, a remedy for the breach of the treaty might be found in some cases in any surviving obligation of compulsory judicial settlement. Thus, at the end of the second World War, as between Switzerland, for instance, and Poland, or Belgium, or Holland, the provisions of the Optional Clause might be found sufficient for the purpose. A decision of the Permanent Court of International Justice on the matter would, in substance, not be without effect as between states in whose relations the Optional Clause never was or has ceased to be operative, as, for instance, may be the case of Great Britain as the result of the British declaration of September 1939 suspending the operation of the Optional Clause with regard to disputes arising out of events occurring during the hostilities. A neutral State refusing to comply with its treaty obligations or to submit their disputed interpretation for international judicial decision would not only expose itself to a denunciation of the existing extradition treaties. The consequences of a breach of a treaty of this kind, in defiance of the public opinion of the world and in a misplaced insistence on the principle of asylum, may justifiably cover acts of reprisals and self-help appropriate to the occasion, especially if the neutral State can adduce no justifiable doubts as to the prospects of a fair and impartial trial.

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[1] A person who, during war, has committed treason by having joined the enemy of his country is a political offender—although his act does not aim at a change in the government or of its form.

[2] The Supreme Federal Court of Brazil has described as political the offence of trading with the enemy: *In re Dr. Paulo Deleuze, Annual Digest*, 1919–22, Case No. 187. It will also be noted that the legislation of most States excludes from extradition purely military offences, (i.e. desertion and offences against discipline) as well as fiscal offences.

It is now necessary to consider the question of surrender from neutral countries apart from the existence or the applicability of extradition treaties. What, in such cases, are the means by which neutral states may pursue a policy of abstaining from granting asylum to persons accused or likely to be accused of war crimes which cannot justifiably be treated as being of a political character? Assuming prudence and good faith on the part of the neutral State, the abuse of the right of asylum may be considerably reduced by its refusal to admit indiscriminately such persons to its territory. Their exclusion would be an administrative measure unlikely to raise problems of grave difficulty in the field of the municipal law of the neutral State. The belligerent may be in a position—and it will as a rule be wise for him to do so—to supply the neutral State with lists of persons accused of war crimes, with an indication of the nature and the circumstances of such crimes, so as to enable the neutral State to exercise discretion in the admission of enemy persons in case it does not wish to adopt a policy of general exclusion, a measure which it may deem incompatible with the principle of political asylum.

However, to consider this matter merely from the point of view of the admission of war criminals to neutral territory is to simplify the problem. The neutral State may not be able to prevent the illegal entry of such persons by land, by sea and, especially, by air. In that case, if it is unable or unwilling to surrender them to the *belligerent* owing to the absence or the inapplicability of an extradition treaty, it may still *deport* to their *home State* persons accused of war crimes who have entered its territory and with regard to whom no obvious considerations of political asylum prevent their deportation. The victorious belligerent will find means for bringing the deported individuals to justice in the same way as other enemy nationals accused of war crimes. Any previous warning by the neutral State against entering its territory will strengthen its position in the matter—just as any previous warning addressed by the belligerent to the neutral State[1] will put the latter on its guard against indiscriminate admission of fugitives fleeing from justice. Deportation is in most countries within the province of the executive authorities and although the law often limits their discretion in the matter, the antecedents of the persons concerned and the fact of their illegal entry are, generally, substantial factors in determining the discretion of the Executive. In proceeding to such measures of deportation, the neutral State will be legitimately guided by the respect due to the principle of political asylum conceived in the broad sense as indicated above. It will refrain, and legitimately and properly refrain, from a course of action which, in the natural course of events, might result in the delivery to the victorious belligerent of persons who, while having been guilty of violations of rules of warfare, are not accused of common crimes against life and, for reasons of private gain, against property. It will be entitled to take into consideration the prospects of a fair trial.

We may now examine the legal implications of the situation arising from any obstructive attitude of a neutral State which, in acting out of a misplaced attachment to the humanitarian principle of asylum or out of ideological affinity with the defeated State, insists on offering the shelter of impunity to persons accused of war crimes of a non-political character and on refusing to surrender them either by way of extradition or by way of deportation. If that attitude is in violation of a valid treaty of extradition, the legal position does not give rise to difficulty.[2] In strict law the position would also seem to be clear when there is no applicable extradition treaty; there is in such cases no legal duty to extradite or to surrender the fugitive. It is generally maintained that in such cases the duty, if any, is a moral one. However, this is a view which is too rigid to be fully acceptable. Undoubtedly, in any specific case a State is under no legal duty to extradite unless it is bound to do so by treaty. But if a State were to decide to refrain altogether from concluding extradition treaties and to open its doors to criminal fugitives to the detriment of the peace and safety of its neighbours, would its action be legally unobjectionable? Ought we not to distinguish between the refusal to conclude any particular extradition treaty and a general licence to fugitives from justice? Do extradition treaties merely prescribe the conditions on which States agree to limit their sovereign discretion or do they give expression to an underlying general duty of extradition? Moore, who speaks with authority in his own right and as the author of a leading treatise on extradition, says: "The right [to grant or to refuse asylum], therefore, is coupled with the duty, amply acknowledged by the multiplication of extradition treaties, to abstain from asserting the sovereign power for the purpose of shielding individuals charged with the crime from trial by competent judicial authorities. The right of sovereignty is conserved in determining the conditions and limitations under which the fugitive is to be delivered up."[3] On the other hand, Hall, in a weighty exposition, gives expression to the predominant view in maintaining that "positive international law . . . does not recognize the duty of extradition".[1]

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[1] Such as that addressed by Great Britain and the United States in July 1943 to Switzerland, Sweden, Spain, Portugal, Liechtenstein, Turkey, the Vatican City and Argentina.

[2] See above, p. 88.

[3] *Digest of International Law,* vol. III (1906), p. 757.

It is probable that a correct legal appreciation of the position must be sought by reference not to the limited subject of extradition but to the operation of the prohibition of an abuse of rights in relation to the territory of the State. The State's right of sovereignty over its territory, including its right to grant asylum to fugitives, is, in the absence of treaty obligations, exclusive and absolute. But if that right is used in a way prejudicial to the legitimate interests and claims of other States then it degenerates into an abuse of right which international law will not countenance. International law prohibits injurious use of territory not only in such matters as nuisance caused by uncontrolled emission of noxious fumes[2] or toleration of preparations for hostile expeditions into neighbouring territory.

The privilege and the moral duty of granting asylum to the persecuted ought not rashly to be interfered with. But the respect due to that privilege must, in turn, be conditioned by the manner in which it is exercised. The principle of asylum is put in jeopardy when it is used in a way amounting to a denial of justice to States which, in their collective capacity and in the persons of their citizens, deem themselves to have been victims of cruel and systematic crimes. An abuse of a right is not lightly to be presumed. The doctrine of abuse of rights is an innovation in international law. But, although an innovation, it has received endorsement by the Permanent Court of International Justice and, in obvious cases, it provides a legitimate starting point for remedial action.[3] The circumstance that extradition or surrender is refused in respect of crimes condemned by international law and international conventions to which the neutral State in question is a party, would be particularly relevant. The situation, in that case, would be totally different from that which arose as the result of the refusal of Holland to deliver William II of Hohenzollern whom the Allied and Associated Powers arraigned, in Article 227 of the Treaty of Versailles, "for a supreme offence against international morality and the sanctity of treaties". Neither the accusation of the Treaty of Versailles nor the request subsequently made in pursuance thereof was primarily based on law. As M. Clemenceau put it in his Note of January 11,1920, this "was not a case of a public accusation fundamentally of a legal character, but of an act of high international policy demanded by the conscience of mankind". The situation is different when the insistence on extradition or surrender is based on charges of violation of the law and when the victorious belligerent is in a position to assert that the crimes perpetrated by the enemy were unprecedented both in their extent and in their studied disregard of legal restraints. Any dogmatic and obstructive attitude of the neutral in defiance of the sentiment of the overwhelming majority of States and in disregard of the moral obligation to co-operate in the enforcement of international law may create a situation in which the belligerent concerned may, in the interests of justice, feel called upon to enforce the law by self-help and by acts of retaliation—not to mention such measures of retorsion as every State is entitled to adopt in face of an unneighbourly and unfriendly attitude. Such measures, when prompted by the righteous indignation of powerful and numerous States and their peoples resisting what they deem to be a parochial and short-sighted generosity displayed in aloof disregard of the outraged sentiment of the vast majority of mankind may, in their effect, be indistinguishable from many a drastic sanction normally reserved for glaring breaches of the law of nations.

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[1] *International Law*, § 13 (3rd ed., 1890, p. 61).

[2] See the Award in the *Trail Smelter Arbitration* (*United States* v. *Canada*), *Annual Digest*, 1938–40, Case No. 104.

[3] See Oppenheim, *International Law*, vol. 1 (5th ed., 1927), § 155*aa*.

Undoubtedly, neutral States are entitled to ask for an assurance that the intended prosecution for war crimes will not be used as an instrument of revenge. They are entitled to claim the right to refuse extradition or deportation in cases in which, in their view, the alleged offence partakes of the character of an offence against the rules of warfare in its wider sense rather than of a common law crime and in which they are prepared to submit that preliminary question to judicial determination. They may avail themselves of any offer, and insist on making it as effective as possible, to associate neutral assessors with the work of the courts charged with the trial of war criminals. But once such guarantees may be reasonably held to exist, any insistence by neutral states on sheltering war criminals constitutes not only an unfriendly act but also an assertion of formal rights of sovereignty in denial of that community of law which alone, in the long run, renders possible the normal observance of accepted rules of international law.

THE UNIFICATION OF MARITIME INTERNATIONAL LAW IN TIME OF PEACE

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THE declaration contained in point 7 of the Atlantic Charter on the establishment of "a peace which should enable all men to traverse the high seas and oceans without hindrance", sufficiently expresses the intention of the United Nations to strive in the post-war period for a real freedom of the seas within the framework of a permanent system of "general security". These pledges must not remain merely words of encouragement to the peoples comprising the United Nations, but require to be translated into facts and implemented in the forthcoming Peace Treaties.

In spite of the great advance in air navigation, sea communications are bound to play a predominant part in the reconstruction of a new world organization which should include appropriate machinery whereby the sea, as the great highway between nations, may best be exploited and developed in the interests of mankind and international understanding. In the writer's view, the full realization of these two objects—freedom of the seas and general security—is attainable only through the establishment of an international authority equipped with adequate powers to unify the laws of the sea and to ensure their observance under an obligatory system of sanctions.

The freedom of the seas. The doctrine of the freedom of the seas for which both Great Britain and the United States have consistently fought, has very often been proclaimed in the past, but its application, even in time of peace, has never been fully realized. Various restrictions and discriminations in the form of subsidies, monopolies, exchange controls, tariffs and quotas, have seriously impaired the theoretical right of all nations to use the seas on terms of real equality. The removal of all these barriers and a more precise definition of the implications contained in the principle of the freedom of the seas, are matters which call for an international agreement at the end of the present hostilities. They are closely connected with the unification of maritime international law and it may not therefore be considered as wholly irrelevant at the present time to give an outline of the efforts already made in this direction, together with a brief indication of what further steps may prove necessary to complete this uniformity.

Territorial waters. One of the first subjects which requires unification, in the interest of all maritime nations, is the question of the extent of territorial waters. It is common ground that the principle of the freedom of the seas only applies to the high seas, since international law confers on states certain specific rights of jurisdiction over their marginal waters. But the exact limit of these waters still lacks universal agreement. The Codification Conference which met at The Hague in 1930 failed to achieve its object, as the divergent views expressed by some of the nations represented at that conference could not be reconciled at the time. A new approach to the problem appears, however, justified as a result of the stimulus to international consciousness brought about by the recent diplomatic and political conferences and treaties between the United Nations. A post-war Conference may therefore achieve what the 1930 Conference proved unable to effect.

The three-mile limit. Among the chief maritime Powers, Great Britain, the United States, Germany, and Japan have consistently adhered to the three-mile extent of territorial waters, which appears to be the minimum limit compatible with the safety and protection of a littoral State. The extension claimed by a minority of countries to six, nine or twelve miles, with or without a contiguous zone, seriously undermines the principle of the freedom of the seas as it increases the territorial rights of the littoral states and restricts to that extent the free use of the seas by the other nations. It also creates an unnecessary confusion and adds to the difficulties of seamen as a result of the diversity of these national claims.

The reluctance shown by legal opinion in the United States to any departure from the three-mile limit is reflected in the recent decision of the United States Supreme Court in *Skiriotes* v. *State of Florida*[1] which raised the question whether a State could lawfully prohibit the use of diving apparatus for the taking of sponges at a point beyond the three-mile boundary, but within the nine miles covered by that State's legislation. The Supreme Court upheld the prohibition, not on any extension of territorial waters, but on the ground that Skiriotes was a citizen of Florida and therefore amenable to its laws. Another striking illustration of the American adherence to the marginal belt of three miles is to be found in the fact that when the United States Government sought to extend its Liquor Prohibition Laws, under the Tariff Act of 1922, to twelve miles of territorial waters, it sought and obtained the consent of the other maritime nations by the conclusion of the Liquor Control Treaties signed between 1924 and 1933, when the prohibition laws were repealed.

In Great Britain, the same limit has been constantly applied ever since the enactment of the Customs Consolidation Act of 1876, which was described by the British Government as the "Act by which British municipal legislation was made to conform with internationa law".[2]

A general recognition of the three-mile extent of territorial waters, now accepted by maritime nations representing eighty per cent of the world's total tonnage of shipping, appears therefore to provide a practical solution to the problem. In a few exceptional cases where this limit may prove to be insufficient for the safety and protection of a given nation, "it will no doubt be open to that nation to enter into the necessary agreements with other states enabling the country concerned to exercise such rights of control over the merchant vessels of the foreign State concluding the agreement as may be necessary".[3]

This assumes the signing of bilateral treaties confined to certain specific purposes and binding on the contracting states only—a procedure which by its nature is necessarily limited.

Inter-Imperial legislation. A wider unification of the rules of the sea is traceable in Federal or regional understandings. The British Commonwealth of Nations provides an outstanding example of successful agreements on all major matters relating to inter-imperial communications and trade whose establishment and maintenance is regarded as being the responsibility of the Empire as a whole. The Imperial Conference which met in London in 1929 adopted an important Report on "the operation of Dominion legislation and merchant shipping legislation",[1] envisaging uniformity within the Empire on such vital questions as the common status of ships, their standards of safety, their internal régime and discipline and the carriage of goods by sea. In view of the unmistakable trend towards closer understanding which is increasingly manifest within the Empire, this work of unification is likely to be continued in the post-war period by the summoning of consecutive Imperial Conferences, whose functions could be usefully supplemented by the setting-up of an Imperial Sea Council sitting permanently in London and endowed with administrative and executive powers. The importance of uniform shipping legislation on all problems of common policy cannot, indeed, be overestimated in the case of a far-flung Empire so largely dependent on sea communications.

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[1] (1941) 313 U.S. 69.

[2] British Memorandum to the U.S. Government of July 14, 1923.

[3] British reply to the Experts' "Questionnaire on territorial waters" in League of Nations Publications, C. 74, M. 39, 1929, V.

International Maritime Committee. Side by side with this Federal or regional unification, a larger scheme embracing all the world's routes is essential since shipping is, and must remain, an international affair. The advantages resulting from a codification of the rules of the sea were very much present to the founders of the International Maritime Committee, a voluntary association of jurists, shipowners, merchants, and underwriters. They succeeded in creating in 1897 a central body, capable of reducing to a single formula the views held by the national Committees established in the various maritime countries, and to promote their general acceptance at diplomatic conferences, usually held in Brussels and having an official character.

Collisions. The first substantive work due to the labours of the Committee was the adoption at the Brussels Conference of 1910 of a Convention on "the unification of certain rules of law in regard to collisions"[2] which imposed an obligation on the contracting states not to include in their municipal laws or regulations any provisions which might be contrary to the rules laid down in the Convention. In Great Britain, the Brussels Convention was given effect to by the Maritime Conventions Act, 1911, which has worked satisfactorily on the whole. The Convention has also been adopted by all the other chief maritime nations, with the important exception of the United States.

As regards the rules of the road at sea, the Order in Council of October 13, 1910,[3] has established general uniformity on the subject. Experience has, however, shown that some of these rules required certain changes in the light of the modern advances in navigation which were accordingly brought about by the London Convention of 1929.[4] But the date of their coming into force has not yet been agreed internationally—a matter which will call for urgent attention in the post-war period.

The Brussels Convention of 1910 did not deal with the question of jurisdiction in collision actions involving a conflict of law, and the practice therefore varied in the different countries. The Admiralty Courts in Great Britain and the United States claimed the widest possible jurisdiction on the ground that collisions were governed by "the common law of Nations" and rested consequently in the discretion of the Admiralty Courts. Indeed, many foreign litigants availed themselves of this discretion in order to bring their disputes before the English Admiralty Court, even though both ships in collision were foreign and the collision occurred outside British territorial waters. On the other hand, Continental Courts exercised, on principle, a much more restricted jurisdiction. In order to minimize these conflicts of civil jurisdiction, the International Maritime Committee adopted at its Paris Conference of 1937 a Convention which gives a plaintiff the option to bring his action before the Court of the defendant's domicile or of the port of registry of the defendant ship or of the place of her arrest or at the place of the collision, if it occured in its territorial waters. The Convention, however, maintains the existing right of the parties to institute a collision action before a Court of their own choice or to refer it to arbitration by mutual agreement.

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[1] Parl. Papers, 1930 [Cmd. 3479].

[2] Misc., No. 5 (1911) [Cmd. 5558].

[3] S.R. & O., 1910, No. 1113.

[4] Treaty Series, No. 34 (1932) [Cmd. 4198].

A second Convention adopted at the Paris Conference of 1937 provides for the exercise of criminal jurisdiction in collision actions. It enacts that the master, or other person in the service of a ship, can be prosecuted only before the courts of the vessel's flag and that no arrest or detention of the vessel can be ordered by any other authority.[1] This Convention reflects the anxiety felt in shipping circles by *The Lotus* judgment of the Permanent Court of International Justice,[2] which made it possible for "double prosecutions" to be instituted against the masters of ships, viz., before the criminal courts of one of the colliding ships and also before their own courts.

A third Convention, also adopted at the Paris Conference of 1937, deals with the provisional arrest of ships in collision matters. But owing to the outbreak of the war, no progress was made towards the ratification of any of these three conventions.

The provisions contained in the Paris draft conventions on civil and criminal jurisdiction are substantially reproduced in the Treaty on "International Commercial Navigation Law" signed in 1940 at Montevideo by the principal South American Republics.[3] In particular, Article 9 of the Treaty provides that "the master and other persons serving in the vessel cannot be prosecuted either criminally or in disciplinary proceedings except before the judges or tribunals of the State whose flag the vessel was flying at the time of the collision".

Salvage. The second important Convention adopted by the Brussels Conference of 1910 relates to the unification "of certain rules of law respecting assistance and salvage at sea".[4] It reconciles the divergent views prevailing before 1910 by declaring that every act of assistance or salvage which has had a useful result gives rise to a claim to equitable remuneration, but in no case is the salvage reward to exceed the value of the property salved. The Maritime Conventions Act of 1911, which brought into force the Brussels

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[1] *Revue de droit international*, 3rd Series, vol. 19 (1938), pp. 886–97.

[2] *Recueil des arrêts*, Series A, No. 10 (1928).

[3] *Segundo Congreso Sudamericano de derecho international privado*, Acta Final, pp. 31–40.

[4] Misc., No. 5. (1911) [Cmd. 5558].

Convention, omitted, however, to include amongst its provisions article 8 of the Convention which empowered the "Court to reduce or deny remuneration, or to award a reduced remuneration if it appears that the salvors have by their fault rendered the salvage or assistance necessary or have been guilty of theft, fraudulent concealment or other acts of fraud". As Lord Maugham pointed out in *The Beaverford*,[1] this omission gave rise to avoidable litigation and it appears therefore desirable that the Act of 1911 should be amended accordingly.

Many more substantial modifications have been rendered necessary by recent scientific advances in the location of invisible objects by means of radio which have thus increased the chances of salvage of wrecked property. Another important development is the help which aircraft is able to give in salvage operations.

A preliminary draft Convention for the unification of certain rules relating to assistance and salvage of aircraft or by aircraft at sea was adopted by the International Technical Committee of aerial legal experts in September 1936. Notable progress in this direction has also been made in South America by the conclusion of the Montevideo Treaty of 1940 (already referred to) which recognizes this novel factor and states that its provisions "apply to services of assistance or salvage rendered by vessels and airplanes at sea or conversely. They apply also to services rendered to such vessels or planes by persons on shore or by means of floating structures" (article 14).

In the United Kingdom, there existed at the beginning of the present war a serious lack of salvage vessels and equipment and also of men with experience of salvage work. This led the Select Committee on National Expenditure, after a review of the magnitude of the work achieved during the last three years by the salvage organization of the Royal Navy, to recommend that the Admiralty should continue after the war to hold all the existing salvage vessels and equipment which should be distributed, "in consultation with British shipping, underwriting and salvage interests, amongst Royal Naval Establishments at home and overseas on a care and maintenance base".[2]

To revert to the International Maritime Committee, it was able to bring to a successful conclusion, after many years of discussion, the following further Conventions:

Limitation of shipowners' liability, which was adopted at the Brussels Conference of 1924.[3] It reconciles the conflict of views which had prevailed until then between the English system which made the owner liable for the acts and omissions of his master, his responsibility being limited by a fixed amount, regardless of the fact whether the ship was lost or not, and the Continental system which based the owner's liability on the value of the "maritime adventure" (ship, freight and accessories) so that his responsibility disappeared with the abandonment of the adventure.

Carriage of goods by sea. The International Law Association, which had already promoted by "the York-Antwerp Rules" the assimilation of the laws of general average on a voluntary basis,[4] further pursued its work of unification at The Hague Conference of 1921 by the adoption of a set of rules on the contract of affreightment. These rules, which became known as "The Hague Rules", purported to put an end to the existing confusion on the rights and liabilities of shipowners and cargo-owners under a bill of lading. They were taken up by the International Maritime Committee in 1923 and subsequently incorporated in the Brussels Convention signed in the following year.[1] One of the chief results achieved by this Convention is to subject a shipowner to certain well-defined responsibilities out of which he cannot contract himself by the use of exceptive clauses. At the same time, the Convention gives him the benfit of specific rights and remedies resulting from faults in the carriage of goods by sea for which he cannot be held responsible. The Convention has now passed into the legislation of practically all the maritime Powers and has also met with the general support of the commercial and shipping industries.

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[1] [1938] A.C. 136.

[2] 15th Report (1942–3), White Paper, S.O. 127.

[3] Treaty Series (1931), p. 125.

[4] Adopted in 1890 and again revised at the Stockholm Conference of 1924, 15th and 33rd Reports of the I.L.A., pp. 279–85 and 670–694.

Maritime liens and mortgages A third Convention was adopted at Brussels in 1926,[2] based on the principle that a mortgage validly contracted in one country, in accordance with the law of the vessel's flag, is entitled to recognition in all the other signatory states. It also unifies the rules relating to the definition of liens and settles their priority amongst themselves and in relation to mortgages. On one important point, that of the lien for necessaries during a ship's voyage, considerable hesitation was expressed in Great Britain on the rules current in the majority of continental countries postponing this lien to a mortgage. Under English law, the master is given a lien for his disbursements which enjoys priority over a mortgage, but he is not given a direct lien for necessaries. Eventually, the Convention adopted the rule that the lien for necessaries should take priority over a mortgage.

Immunity of State-owned ships. The exemption from jurisdiction recognized by international law to public vessels was beginning to lead to serious disadvantages as a result of the practice, which became increasingly common after the end of the first Great War, for states to engage in commercial operations by owning, requisitioning or chartering merchant vessels employed in the carrying trade. The Conference convened by the International Maritime Committee at Gothenburg in 1923 correctly interpreted the unanimous opinion of the shipping industry that sovereign states which elected to embark on ordinary trading ought to submit to the same responsibilities as any other private shipowner. This principle was embodied in the Brussels Convention of 1926,[3] which declares that, as a general rule, ships and cargoes owned or operated by Governments for commercial purposes shall, as to legal actions and remedies, be subject to common maritime law. The Convention was supplemented by a Protocol signed at Brussels on May 24, 1934.[4] The construction to be placed on both these instruments was discussed by the Court of Appeal of Hamburg in the important case of

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[1] "For the unification of rules relating to certain bills of lading", Treaty Series, No. 17 (1931) [Cmd. 3806]. Adopted in Great Britain by The Carriage of Goods by Sea Act, 1924, and in the United States by *The Carriage of Goods by Sea Act*, 1936.

[2] "For the unification of certain rules relating to maritime liens and mortgages", League of Nations Treaty Series, No. 2765 (1931).

[3] On "the immunity of State-owned ships", Hudson, *International Legislation* (1931), vol. 3, p. 1837.

[4] *Ibid.*, vol. 6, p. 668.

The Visurgis and The Siena.[1] It was there held that no immunity of jurisdiction attached to a vessel unless it was operated by a State and used exclusively on governmental and non-commercial services. The same interpretation was adopted by the Eire High Court in *The Ramava*,[2] which decided that no exemption from process existed at present in favour of trading vessels, even if state-owned: "the immunity only applied to State vessels *publicis usibus destinata*".

Obligatory insurance of passengers. No Convention has so far been signed on this subject, but a Resolution was carried at the Antwerp Conference of the International Maritime Committee in 1930, based on Sir Norman Hill's interesting Report of 1925, to the effect that the study should be pursued of a system based on the obligatory insurance of passengers. Such a system should guarantee a sufficient indemnity to passengers for accidents (irrespective of whether they were due to the shipowner's fault or not), arising out of the contract of carriage or the unseaworthiness of the vessel.

It will be seen that the work already accomplished by the International Maritime Committee has covered a wide field and it is confidently expected that it will be resumed after the end of the war. Unfortunately, some of these Conventions, although signed by the chief naval powers, still remain unratified.[3] A second urgent reform would consist for the states ratifying a Convention to enact it in exactly the same form in which it was adopted by the international conference instead of re-enacting the existing national law with the necessary modifications. This latter practice leads to a multiplication of municipal laws and to conflicting interpretations by the various courts. Much better results would, no doubt, be achieved if an international treaty or convention were to be adopted *in toto* by the ratifying Governments as was done in the case of the "International Convention for the Protection of Submarine Telegraph Cables" signed at Paris in 1884.[4]

Codification by the League of Nations. A new organ of unification emerged after the conclusion of the first Great War by the creation of the League of Nations. The importance attached to sea transit by the League is illustrated by article 23 of the Covenant which declared that "the members of the League will make provision to ensure and maintain freedom of communications and transit and equitable treatment for the commerce of all nations". Its first step in this direction was the convening of the Barcelona Conference in 1921, which agreed on two Conventions and Statutes: (*a*) "on the freedom of transit" and (*b*) "on the régime of navigable waterways of international concern",[5] both of which proved very incomplete in practice. At the Geneva Conference, which followed in 1923, three further Conventions were adopted: (*a*) on "the international régime of maritime ports" which provides that the sea-going vessels of the signatory Powers "shall enjoy, on a basis of reciprocity, equality of treatment in, and freedom of access to, the maritime ports of the contracting parties".[1] The Convention, however, excludes from its provisions maritime coasting trade, and also allows signatory states the right to reserve the exercise of towage in their ports and of pilotage; (*b*) on "the transport and transit of electrical energy" which was inspired by the conception that a State possessing abundant electrical energy, partly unused at its source, should cede it to a State which is in need of it, free of transit fees and other charges; and (*c*) "on the marshalling of hydraulic forces" which was intended to encourage their adequate development by each of the contracting states and also to facilitate international research for their utilization.

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[1] Affirmed by the Supreme Court of the Reich, *Annual Digest of International Law Cases* (edited by Prof. Lauterpacht), 1938–40, p. 284.

[2] *Zarine* v. *Owners of Ramava* (1941) 75 Irish L.T. Reps. 153. Affirmed by the Irish Supreme Court on July 3, 1941.

[3] Great Britain has not yet ratified the following Conventions: "Limitation of shipowners' liability"; "Maritime liens and mortgages" and "Immunity of state-owned ships".

[4] The Submarine Telegraph Act, 1885, declares in section 2 that the articles of the Paris Convention "shall be of the same force as if they were enacted in the body of this Act".

[5] (1923) [Cmd. 1992–3].

Again, at Geneva in 1930 three further Conventions were signed: (*a*) on the registration of inland navigation vessels; (*b*) on administrative measures for attesting the rights of these vessels; and (*c*) on the unification of certain rules concerning collisions in inland navigation.[2]

Work of the International Labour Organization. But it is principally in the field of social maritime legislation that the International Labour Organization, working under the auspices of the League of Nations at Geneva, has attained notable progress. From 1920 to 1936, no less than ten international Conventions were adopted dealing with the "placing of seamen", "the unemployment indemnity for seamen in case of loss or foundering of their ships", "the minimum age of admission of young persons employed as trimmers and stokers", "the compulsory medical examination of children and young persons employed at sea", "the regulations on the hours of work and manning", and "the shipowners' liability to sick and injured seamen." The outbreak of the war in 1939 did not prevent the International Labour Organization from pursuing its work. The Joint Maritime Commission held in London in June 1942 recommended the preparation of an "International Maritime Charter" on "the guiding principles for an international minimum standard applicable to seafarers of all nationalities and embodying the best practical social legislation affecting seafarers". This Charter has already been accepted in Great Britain which in all matters of the improvement of life at sea and of navigation has led the way. The Joint Commission also passed a resolution to the effect that "the paramount consideration should in all cases be the safety of the seamen and that considerations of expense should not be allowed to be a barrier to the adoption of the most effective measures of protection". A further improvement would consist in the establishment of an international wage-rate and the levelling-up of working conditions to a uniform standard on board the merchant vessels of all nations. Several of these points were considered by the governing body of the I.L.O. which met in London on December 16, 1943, for the purpose of making arrangements for an International Labour Conference in 1944 to consider "ways and means of bringing into effect the social and economic declarations of the Atlantic Charter",[3] including improved labour standards, economic advancement and social security (Point 5 of the Charter).

Safety of life at sea. Valuable as the work of the League of Nations has been in the legal and social sphere, the safety of navigation under peace conditions is a major problem which requires direct agreement by all states and not merely by the members of the League. Even before the creation of this body, the sinking of the *Titanic* in 1912 made nations realize the importance of international co-operation for the safety of life at sea. A Convention was adopted at the London Conference of 1914, but owing to the outbreak of the first Great War, it could not be brought into effective operation. The subject was again discussed at the 1929 Conference, which also met in London and which produced a more complete and up-to-date Convention.[1] It dealt with the construction of ships, their life-saving appliances, and the safety of navigation generally. Most of these provisions will require revision in the post-war period as a result of recent scientific developments in radio-location and reconnaissance by aircraft.

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[1] (1925) [Cmd. 2419].

[2] Hudson, *International Legislation*, vol. 5, pp. 815, 822, 848.

[3] *The Times*, November 26, 1943.

Wireless apparatus. The London Conference of 1929 also provided for the equipment with wireless telegraphy of ships engaged on international voyages other than cargo ships of less than 1600 tons gross tonnage. This provision must be read in conjunction with the "International Radio-telegraph Convention" signed at Washington in 1927,[2] which reaffirms the rule of the compulsory equipment of ships with wireless and further declares that communication between ships at sea is obligatory whatever the system of wireless apparatus employed and that priority must be given to distress calls whatever their origin. The matter of radio communications and wave bands was further considered in a series of international agreements, ending with the Cairo Convention of 1938 and the European Broadcasting Convention of Montreux, 1939.

An important step forward would consist in extending the maintenance of adequate radio services on all sea-going vessels, irrespective of their size or nationality, and the increased use of radio telephony, lightships and signalling beacons and buoys. The Select Committee on National Expenditure[3] gave urgent consideration to the employment of radiolocation for post-war improvements in the safety of navigation under conditions of low visibility and recommended that the British Government should examine the question of the use of the apparatus now owned by them for this purpose, together with the making of international agreements on the subject. International regulations will also become necessary for the succour and rescue of seamen by aircraft, since recent developments in aviation have shown the great advantages to be derived from aerial reconnaissance in promoting the safety of life at sea.

River navigation. Another subject which calls for international codification is the better utilization of the flow of all international rivers. The question of their industrial and agricultural exploitation for the common benefit of the riparian states was envisaged in the Peace Treaties concluded after the first Great War, but their provisions lacked both completeness and practical sense. A tribunal which was to be set up for the "suspension or suppression of works impeding navigation in the international portions of navigable rivers" never appears to have functioned. It is not difficult to forecast even now the considerable advantages which rivers will be capable of providing in the post-war period for the improvement of navigation and the development of fisheries and of water power. There are, however, two fundamental principles which should be kept in view: (1) the reaffirmation of the freedom of navigation in all international rivers; (2) the recognition by riparian states that their rights of control over the rivers crossing through their territories must not be exercised in a manner prejudicial to the interests of other states. On the contrary, a "rule of comity" ought to be universally recognized in favour of the "equitable division of benefits"[1] deriving from the use of these waters for industrial and agricultural purposes. As the Italian Court of Cassation held in 1939,[2] "a principle of solidarity should prevail amongst states for the enjoyment of the common sources of the wealth of rivers". An instance of such solidarity is provided by the active interest taken in Canada and the United States for the perfection of plans producing the maximum results in the important St. Lawrence waterways.[3]

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[1] Treaty Series, No. 34 (1932) [Cmd. 4198]. The promotion of safety based on the limits to which ships on international voyages may be loaded is regulated by the "International Load Line Convention" signed in London in 1930 (*ibid.*, No. 35 (1932)) [Cmd. 4199]. Cf. The Merchant Shipping (Safety and Load Line Conventions) Act, 1932.

[2] Hudson, *International Legislation*, vol. 3, p. 2197. Cf. "The Inter-American Radio Communication Convention" signed at Habana in 1937, U.S. Treaty Series (1938), p. 938.

[3] 15th Report (1942–3), p. 15.

International water policy. The same co-ordination of efforts appears essential in all matters relating to the conservation and control of irrigation, water power and pollution abatement in all waters of international concern. Under existing conditions, there is an unnecessary multiplication and waste of effort as a result of the many national or Federal groups, most of which work independently of each other. It has been estimated that in the United States alone there are over thirty Federal agencies engaged on some type of active interest for the use or control of national waters. "Each has its organic act approved by Congress. Several such acts are overlapping, many deviate fundamentally from each other. Some, like those related to the important problem of pollution control, are inadequate".[4]

International regulation of fisheries. Modern research has shown how mistaken was the belief current in the earlier part of the nineteenth century that the resources of the sea were inexhaustible. It has also shown that the unscientific exploitation of fisheries is not only wasteful but, in some cases, actually destructive to many species of fish. Even when a State seriously tries to protect its fisheries, the control which it is capable of exercising over its territorial waters is likely to prove inadequate in view of the development of long-range fishing vessels comprising the so-called "mother ships", able to cruise independently of the shore for many hundreds of miles and equipped with new and efficient machinery. International regulation is therefore essential for the protection and development of fisheries over large areas of the seas.

As between Great Britain and France, the control of fisheries in the English Channel is provided by a bilateral agreement concluded over a century ago.[5] A wider Convention, signed in 1882, regulates the fisheries in the North Sea, but both Norway and Sweden felt unable to accept it as they did not agree to its definition of the North Sea or the three-mile limit of territorial waters. Closely related to this Convention is a further agreement adopted at The Hague in 1887 "for the prohibition of the Liquor Traffic in the North Sea", but in addition to Norway and Sweden, France has also failed to adhere to this Convention.

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[1] U.S. Supreme Court in *Connecticut* v. *Massachusetts* (1931) 282 U.S. 660. Cf. *B.Y.I.L.*, vol. 12 (1931), p. 202.

[2] *Société Energie Electrique* v. *Compagnia Imprese Elettriche Liguri*, *Annual Digest*, 1938–40, Case No. 47.

[3] See *A Post-war plan and program for the U.S.A.*, issued by the National Resources Planning Board, Washington, 1943, p. 60.

[4] *Ibid.*, p. 62.

[5] Anglo-French agreement of 1839, Hertslet, *Commercial Treaties*, vol. 5, p. 86.

The North Sea Fisheries Convention of 1882 is supplemented by the "Faroe Islands and Iceland Fisheries Convention" of 1901.[1] There was also signed an international agreement in London in 1937 dealing with the use of nets with meshes below a certain size in the North Atlantic, and the taking, landing and selling of some specified kinds of fish below a certain size. The Convention provides for the establishment of a "Permanent Commission" to consider whether its regulations "ought to be extended or modified in future". But this Convention, although substantially operated by the United Kingdom, never became effective owing to lack of ratification before the war broke out.

The protection of the fur seals fisheries in the Behring Sea is covered by the Washington Treaty of 1911, concluded by Great Britain, the United States, Russia and Japan.[2] It proved highly successful in practice. Japan, however, denounced it on October 23, 1940, on the alleged ground that the fur-bearing seals in the Pacific Ocean had multiplied to such an extent as to endanger the Japanese fishing industries. A new International Convention will, therefore, become necessary in the post-war period. It is to be hoped that it will not fail to remedy the omission in the 1911 treaty to provide for a regular and scientific study of the life, cycles and migrations of the species which are essential for its preservation.

A more comprehensive international control is further required in the case of whales, whose regulation at present is very limited and applicable only to baleens in certain regions of the Arctic Ocean.[3] The Chamber of Shipping of the United Kingdom has now set up a Joint British-Norwegian Committee for the purpose of considering the necessary steps which ought to be taken to replace factory ships and to resume whaling operations after the war on the largest possible scale.[4]

The advisability of new international treaties is also strikingly illustrated by the case of salmon which are liable to be netted outside the three-mile limit on their habitual return to the rivers in which they were spawned. No regulation for their protection can therefore be effective unless extended to the high seas by international agreement. Up to now, only one bilateral Convention is in force, that signed at Washington in 1930 by Canada and the United States,[5] and it only applies to the "sockeye" salmon, in spite of the fact that five species of salmon are known to exist on the western coasts of those two countries.

As regards halibut, its preservation is more adequately safeguarded as no less than four Conventions were signed between 1923 and 1941 by Canada and the United States. These two countries also set up an "International

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[1] *State Papers*, vol. 94, p. 29.

[2] Treaty Series (1912), No. 2.

[3] Geneva Convention of 1931, supplemented by an agreement and a Protocol, both signed in London in 1937 and 1938 respectively. Treaty Series (1934), No. 33 and Parl. Papers, 1937 [Cmd. 5487] and A.J.I.L., vol. 34 (1940), Suppl., pp. 121–2.

[4] *Times Trade and Engineering Supplement*, August 1943.

[5] U.S. Treaty Series (1937), No. 918.

Fisheries Joint Commission" endowed with semi-legislative, executive and administrative powers which enabled it to take effective measures for the better protection of the species, and also to pass orders for the creation of the St. Croix, St. Mary and St. Lawrence River Boards which have achieved excellent results.[1]

London Fisheries Conference, 1943. The need of co-ordinating and replacing by a single Convention, conforming to modern practice, the existing agreements on fisheries control in the Atlantic and Arctic Oceans, was the main object for which an International Fisheries Conference was summoned in London in October 1943. It was attended by official delegates from Great Britain, Canada, Eire, Newfoundland, Belgium, France, Iceland, Netherlands, Norway, Poland, Portugal, and Spain. The United States, Denmark, and Sweden were represented by observers. The Conference recommended for adoption "at a further Conference to be held at a later date", a draft International Fisheries Convention consisting of fifty-nine articles and bringing up to date the Anglo-French Convention of 1839, the North Sea Convention of 1882, the Iceland Fisheries Convention of 1901 and the Regulation of Meshes Agreement of 1937, already referred to. The Conference further recommended that a copy of its Final Act[2] should be transmitted to Governments interested in the subject matter and not represented at the Conference with the "hope that, after further consideration, they may see their way to appoint plenipotentiaries to attend the later Conference". An important draft Protocol defines the principles which are to be accepted by the contracting parties for determining the limits of their exclusive jurisidiction over fisheries, as follows:

"*Article* 1.

"1. Each party to the present protocol shall, for the purposes of the application of the Convention, be deemed to possess exclusive jurisdiction over fisheries in waters within three miles from low-water mark along the whole extent of the coast of any of its territories, including dependent islands and banks, the three-mile limit being calculated in the case of bays from a straight line drawn across the bay at the point nearest to the entrance where the width does not exceed ten miles.

"2. The provisions of paragraph 1 of this Article do not prejudice the position with regard to certain bays situated particularly, but not exclusively, in the western hemisphere which are claimed by one or other of the parties to this protocol as being waters where that party has exclusive jurisdiction over fisheries beyond a line drawn across the bay where the width does not exceed ten miles on the ground of (*a*) the decision of International Tribunals, (*b*) International Agreements, or (*c*) prescription."

International regulation of marine wealth. An important step for the exploitation of the natural products of the sea was taken in 1902 by the creation of an "International Permanent Council" having its seat at Copenhagen. It provides an instance of the successful co-ordination of efforts when pursued regularly on strictly scientific lines. But here again the organization devised for its working is confined within narrow and inadequate limits. The Experts' Committee set up by the League of Nations for the "progressive codification of International law" reported in 1927 that the question of the exploitation of the products of the sea was ripe for "regulation by international agreement".[1] But nothing further was done in the matter. Much more valuable from the scientific point of view is the work accomplished by the Institute of International Law, more particularly at its Luxemburg Conference of 1937, which adopted a recommendation that the Governments of the States interested in the subject should develop the study, by means of scientific research organized on an international basis, of the problem of the preservation of the wealth of the sea and especially of the marine fauna, not only against abuses resulting from the employment of highly destructive methods and engines, but also against practices harmful to sea life, such as the uncontrolled emission of oil, sewer water and other injurious substances. It further recommended "the adoption, without delay, of all protective measures which a study of these problems would show to be justified in the common interest".[2] Indeed, recent statistical and biological investigations have demonstrated that the policy of conservation of fisheries and of all sea-products generally is a matter calling for a long-term policy, based on comprehensive international agreements.

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[1] The development of fisheries generally in the British Colonies is now engaging the attention of the Colonial Office which as recently as October 1943 appointed a "Colonial Fisheries Advisory Committee" to advise the Secretary of State on problems concerning fisheries, both marine and fresh water, in the Colonial Empire. (*The Times*, Oct. 26, 1943.)

[2] Final Act, dated October 22, 1943, deposited with the United Kingdom Government.

Abolition of barriers to international trade. In this respect, as with all other matters relating to the maximum use of the sea, it is necessary to envisage a condition of international affairs founded on an equality of opportunity for all peace-loving nations. This should imply the end of the mutually destructive rivalries, which characterized the pre-war era, by the imposition of unduly high tariffs, exchange controls and all kinds of trade restrictions.

That the economic prosperity of the future world requires an unhampered and free market was already realized by the delegates assembed at the Eighth Conference of American States held at Lima in 1938.[3] That conference adopted unanimously an important resolution calling upon the American Governments "to reduce, to the greatest extent found possible, all existing types of restrictions upon international trade" and to negotiate for this purpose "trade agreements, embodying the principle of equality of treatment as the most beneficial and effective method of extending and facilitating international trade". It also recorded its conviction that the existing obstacles to trade "create unemployment, lower standards of living, limit opportunities for economic advancement, obstruct the fulfilment of broad social programs, divert trade into uneconomic channels and tend to create international friction and ill-will". But it is not only as between American States that this freedom of trade is necessary. Point 4 of the Atlantic Charter contemplates the universal enjoyment by all states, great or small, victor or vanquished, of "access on equal terms to the trade and to the raw materials of the world which are needed for their economic prosperity". In Great Britain, the General Council of Shipping, after expressing its opinion that the "peace settlement should include effective guarantees against a renewal of the race in subsidies which marked the pre-war period" declares that "the full application of the principles contained in the Atlantic Charter cannot but be beneficial to the interests of shipping: indeed, they are essential conditions of its prosperity".[1] Similarly, the "Post-war Plan and Program for the U.S.A." states that "neither the United States nor the United Nations can achieve full employment after the war without extensive interchange of the products of world resources. New devices may be applied to increase the volume and guide the direction of international trade. Since the United States can attain these aims only in co-operation with other nations, it must relate its internal policies to measures facilitating the economic development of other countries".[2] Considerable encouragement may be drawn in this connection from the successful co-operation between British and American shipping during recent years. The Governments in both countries have already expressed their adherence to a policy implying the use of their large and efficient merchant navies in the service of world requirements when the war is won, and their willingness to collaborate with other like-minded nations in establishing conditions in which the shipping of the world may be freely and economically carried on.[3] In view of the predominant part taken by these two great naval powers in the promotion of international peace and security, the nucleus of the future international machinery must be mainly based on Anglo-American collaboration, in association with the other two leading states, Russia and China. But the smaller nations have also a substantial contribution to make since they are vitally concerned in all matters affecting communications and trade in their respective regions.

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[1] Doc. C. 196, M. 70, 1927, E.

[2] *Annuaire*, vol. 41 (1937), pp. 268–271, based on the preliminary Report prepared in the previous year, *ibid.*, vol. 40 (1936), Pt. 1, pp. 329–74.

[3] *International Codification*, No. 349, April 1939.

Complementary character of sea and air navigation. The vast improvements recently effected in civil aviation require that this new factor should be considered in its relation to sea transport. The two services are bound in fact to be closely associated in future. The British shipping industry has already expressed its willingness to devote some of its unrivalled resources and experience to the promotion of aerial transport.[4] As in the case of sea communications, substantial freedom in the air constitutes an international necessity—a principle not fully appreciated in the pre-war period. Moreover the uncontrolled national subsidies and monopolies which then prevailed were encouraged by the International Air Convention of 1919, which allowed every signatory State to prohibit the operation of aircraft over its territory, even though not intending to land there. The first duty of any future international Air Conference should therefore be concerned with the recognition of the freedom of innocent passage of air-borne international traffic, implying the right to land for refuelling purposes and also in case of real distress.

International Sea Commission. In the more special field of maritime communications, it is submitted that the setting-up in the post-war period of an International Sea Commission, composed of naval experts from all the nations of the world, is bound to contribute to the better utilization of the benefits which the sea is capable of rendering to mankind.[5] Its absence up to now has led to the imposition of arbitrary and uneconomic barriers to international navigation and trade, and to confusion and overlapping in the planning and exploitation of the wealth of the sea. It will be the main function of this international body to effect the rationalization and redistribution of shipping and cargoes on an equitable assessment of world needs, to act as a medium for the solution of all disputes which may arise between its members, and generally to promote the interests of the sea services. It will, at the same time, facilitate the unification of the law of the sea, not merely in the sense of codifying its principles, but also in adapting them to the ever-changing conditions which a future world organization will entail. The unity of purpose and co-operation now established between the United Nations appears to offer the best possible atmosphere for the creation after the war of such a useful and practical machinery.

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[1] *Annual Report of the Chamber of Shipping of the U.K.* (1942–3), p. 115.

[2] Issued by the National Resources Planning Board, 1943, p. 9.

[3] Cf. *The Times*, 13 Dec. 1943.

[4] *Annual Report, supra*, pp. 127 et seq.

[5] Both the International Law Association and the Institute of International Law are in favour of the establishment of such a body: 34*th Report of the I.L.A.* (1926), p. 104, and *Annuaire*, vol. 39 (1934), pp. 711–3.

INTERNATIONAL AGREEMENTS OTHER THAN "INTER-STATE TREATIES"—MODERN DEVELOPMENTS

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A CERTAIN ambiguity in the title of this article[1] must be admitted. In popular parlance, and perhaps to some extent in the literature of international law a "treaty" means any kind of international agreement. Writers on diplomatic practice usually distinguish between "treaties", "conventions", "pacts", etc.; but it is not this sort of distinction that is contemplated in the title of this article. It is not the *designation* of agreements that it is proposed to discuss but the *parties* thereto. For this reason, although in a generic sense the writer accepts the view that the expression "treaty" covers any written instrument by which two or more states declare or establish rules of international law, the term "inter-State treaties" (a clumsy expression) has been necessarily used to distinguish a particular type or form of international agreement. "Inter-State treaties" for the purposes of this article are written instruments signed or negotiated expressly on behalf of Heads of States or States. The traditional form of such agreements is one in which diplomatic agents or Foreign Secretaries sign an agreement for their respective states and receive Full Powers signed by the Heads of their respective states authorizing them to do so. The practice has, however, developed in comparatively modern times (i.e. over a period of some eighty to a hundred years) of making agreements not in this traditional form, but in the form of agreements between governments or even between government departments of different states. The choice of form is not necessarily governed by the importance of the subject-matter, for important agreements have taken the form of agreements between governments. It may be, however, that considerations of convenience influence the choice of form. Thus the practical inconvenience of issuing Full Powers in the name of His Majesty became clear when the British Dominions began to negotiate their own treaties. Such Full Powers are required when a treaty made by a Dominion is one in which His Majesty is described as a party (i.e. what is called here an "inter-State treaty"). This involves the lengthy procedure of a request to the Dominions Office in London for an authority under the Royal Sign manual to be issued permitting the issue of Full Powers under the Great Seal. On the other hand, if a Dominion makes an agreement in the "inter-governmental" form this difficulty does not arise. Full Powers are issued for such an agreement by the Governor General of the Dominion and, if ratification is necessary, a governmental ratification is given.[1] Agreements between the several Dominions themselves or between any one of them and the United Kingdom necessarily take this form.[2] Indeed, it has been estimated that two-thirds of the agreements which were being made by the Commonwealth of Australia in 1938 were in the form of agreements between Governments.[3] It is, of course, the generally understood view of the British Government that such agreements are not subject to international law, but if a question of interpretation should arise regarding them it would appear that the principles of international law would be applied "by analogy" by any judicial or semi-judicial tribunal to whom the question was referred.

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[1] In this article the following abbreviations are used :—

Annual Digest = Annual Digest of Public International Law Cases.
B.T.S. = British Treaty Series.
S.P. = British and Foreign State Papers.
L.N.T.S. = League of Nations Treaty Series.
Martens N.R.G. = Martens, Nouveau Recueil Général des Traités.
Bittner = L. Bittner, Die Lehre von den völkerrechtlichen Vertragsurkunden (1924).
A.J.I.L. = American Journal of International Law.
B.Y.I.L. = British Year Book of International Law.
R.G.D.I.P. = Revue Général de Droit International Public.
Recueil des Cours = Recueil des Cours, Académie de Droit International de la Haye.
Off. J. = League of Nations, Official Journal.

Inter-governmental agreements have not, however, come into existence merely because of the necessity of finding a form of agreement which could conveniently be used by the Dominions, for they began to be used before the Dominions attained their present international status. Such agreements have been used, for instance, by the governments of the colonies of different states concerned with extradition, boundary questions, etc., acting under powers granted by the metropolitan governments. Inter-governmental agreements recite the issue of Full Powers by the governments concerned or more commonly simply state that the signatories are "duly authorized".[4] There can be little doubt that most of the agreements of this nature are intended to create legal obligations not only for the governments who conclude them but for their successors also—i.e. in the last analysis for the State itself.[5] Anzilotti accordingly classifies them as "treaties" in a generic sense, in which classification the present writer is prepared to follow him.[6]

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[1] A detailed discussion of the practice relating to Dominion agreements is not necessary here. The subject is highly technical and involves an exposition of the English law doctrine of Seals. It is fully treated by Stewart, *Treaty Relations of the British Commonwealth of Nations* (1938), Chapter VIII, especially pp. 215–24. As McNair observes: "The case of the British self-governing Dominions has now ceased to be one of capacity and has become one of form." *The Law of Treaties* (1938), p. 135.

[2] See generally McNair, *op. cit.*, pp. 67–82; Stewart, *op. cit.*, Chapter IX. For examples of inter-governmental agreements between the United Kingdom and the Dominions, and between the latter *inter se*, see *Imperial Economic Conference* (1932), *Summary of Proceedings*, Cmd. 4174, 4175, of 1932.

[3] Stewart, "Treaty Making Procedure in the British Dominions", *A.J.I.L.* (1938), vol. 32, p. 473.

[4] Anglo-Tibetan agreement, *B.T.S.* (1907), No. 34; Anglo-French Agreement, *B.T.S.* (1911), No. 24.

[5] What is the State bound by a Dominion agreement? The only possible answer is the Dominion itself. Yet the idea that the Dominions are States in international law is still unfamiliar to English lawyers. See *Attorney-General for Canada* v. *Attorney-General for Ontario & Others* [1937] A.C. at p. 322, where the court speaks of Canada's "accession to international status" without however specifying the nature of that status. The Judicial Committee of the Privy Council in this case left at large the question whether the treaty-making power must be exercised in the name of the King, and where it was vested. It seems clear, however, that the inter-governmental agreement offers a means whereby the treaty-making power can be exercised otherwise than in the name of His Majesty, though the practical results of doing so require further study. See Elkin, *R.G.D.I.P.* (1938), vol. 45, p. 658; Mackenzie, *B.Y.I.L.* (1937), vol. 18, pp. 172–7; *A.J.I.L.* (1937), vol. 31, pp. 466–8; *Canadian Bar Review* (1937), vol. 15, pp. 436–54, 455–63, *Australian Law Journal* (1937), vol. II, pp. 45–50, 87–92.

[6] See Anzilotti, *Cours de droit International* (Gidel trans., 1929), pp. 373–4. See, however, Oppenheim, *International Law* (5th ed., 1937), I, p. 709, n. 3.

Inter-governmental agreements are often signed by Foreign Secretaries or by persons possessing diplomatic status, and consequently a presumption of their legal character may be readily made. An inter-governmental agreement, made in 1931, between the United Kingdom, France, Italy, and Switzerland, concerning the financial obligations of Hungary, was signed by diplomatic agents, and contained a clause providing for the interpretation of the agreement by an arbitral tribunal, or, ultimately, by the Permanent Court of International Justice.[1] A similar agreement, made in 1934, between the United Kingdom and Sweden, was signed by the British Foreign Secretary and the Swedish Minister in London.[2] When inter-governmental agreements are signed by diplomatic agents they receive Full Powers which, in England, are signed by the Foreign Secretary.[3] If they are made subject to ratification (which is frequently dispensed with) the act of ratification is commonly signed by the Foreign Secretary. The form of such ratifications is dealt with fully in books on diplomatic practice.[4] Numerous examples of these agreements are given and noticed by writers on diplomatic practice.[5] Sometimes a *modus vivendi* may take the form of an inter-governmental agreement. Sometimes we find that inter-governmental agreements fall into the category known to American practice as "executive agreements". But this latter category is, in practice, much wider, and sometimes includes inter-State and inter-departmental agreements as well.[6] The practice relating to inter-governmental agreements is certainly less formal than that adopted regarding agreements taking the form of the traditional treaty between Heads of States. They may recite the issue of "full powers",[7] they may refer to "due authorization", or they may be merely made "in the name of the respective governments", and "as a temporary arrangement" without any reference to authorization.[8] But, as a rule, evidence of authority to sign an agreement is required in accordance with the traditional standards, though the form of such evidence may differ from that customarily used in the negotiation of the traditional type of treaty.[9]

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[1] *S.P.*, CXXXIV, p. 351.

[2] *S.P.*, CXXXIV, p. 308.

[3] And not by His Majesty the King as in the case of a Full Power to sign a treaty on behalf or in the name of His Majesty. See for an example Satow, *Diplomatic Practice* (3rd ed., 1932), p. 83. The German practice is apparently the same: Meissner, *Vollmacht und Ratifikation* (1934), p. 95. He bases such agreements on delegation by the Head of State in accordance with customary law. For British doctrine on questions of form see McNair, *The Law of Treaties* (1938), chap. IV.

[4] References are given by Bittner to ratifications by Foreign Secretaries or even by diplomatic agents duly authorized to execute the document: *op. cit.*, p. 234, p. 250, notes 923–30. Ministerial ratifications sometimes take the form of a simple declaration in writing or of a clause attached to the treaty such as "Vue et approuvé" signed by the Foreign Minister: *op. cit.*, notes 1013–14. Practice is not, however, entirely uniform. In the case of one inter-governmental agreement, between South Africa and Germany in 1932, a formal ratification in the name of His Majesty was given: Stewart, *Treaty Relations of the British Commonwealth of Nations* (1938), p. 259, n. 61. For other examples of "governmental" ratifications see Stewart, *op. cit.*, Appendix XII. See also McNair, *The Law of Treaties* (1938), pp. 67–82.

[5] See *Bittner*, pp. 58–61, who gives many instances in Austrian practice dating from the middle of the nineteenth century onwards. See also Satow, *Diplomatic Practice* (3rd ed. 1932), pp. 363–8; Genêt, *Traité de Diplomatie et de Droit Diplomatique* (1931), III, pp. 485–92.

[6] See Crandall, *Treaties, their Making and Enforcement* (2nd ed., 1916), pp. 102–40. Commercial treaties may be made "by the President".

[7] Agreement as to the treatment of German refugees, *Off. J.*, December 1936, p. 1419.

[8] Agreement on the use of broadcasting, *Off. J.*, December 1936, p. 1437.

[9] Cf. Basdevant, *Recueil des Cours*, XV (1926), p. 618.

The complex structure of the modern State has produced yet another type of agreement made directly between departments of State. Such agreements, which are known in French practice as "arrangements administratifs", and are specifically recognized in German practice as agreements "nicht solenne", deal with technical matters falling within the sphere of the department concerned. It is no doubt common enough for technical agreements, e.g., "clearing agreements", to be negotiated and discussed by departmental officials. But, in many cases, these agreements, having been negotiated in such fashion, are signed by diplomatic agents in the form of inter-State or inter-governmental agreements. However, the vast increase of international business in modern times has led to the practice of allowing such agreements sometimes to be concluded directly by the departments concerned.[1] With regard to these a genuine difficulty arises. As they do not pass through diplomatic channels at all it may be argued that they fall outside the purview of international law. But as they frequently form an important and even indispensable body of rules of international organization this would be a serious conclusion to reach. Their precise legal value will be discussed shortly. Meanwhile some account of the municipal practice relating to these agreements must be given.

German practice recognizes the distinction between such agreements and the traditional treaty form. The chiefs of the German departments of State issue Full Powers for inter-departmental agreements.[2] As long ago as 1888 the German Supreme Court held that inter-departmental agreements were an "informal treaty form". International agreements are divided by German doctrine into agreements "solenne" and "nicht solenne".[3] The German tribunals have, in recent years, reaffirmed the legal character of inter-governmental and inter-departmental agreements.[4] German law requires that all Full Powers for treaties shall be laid before the President for signature. But this rule only applies to inter-State or inter-governmental treaties; although the President should be consulted before an inter-departmental or administrative agreement is made.[5] A German law of April 4, 1933, authorizes the Foreign Secretary, in case of urgent economic necessity, to conclude binding administrative agreements with other states, pending the conclusion of a formal treaty ratified in the usual manner.[6] American practice recognizes a category of "executive agreements" amongst which are included inter-departmental agreements such as postal conventions. Examples exist of financial agreements concluded by the United States Treasury and by the United States Liquidation Commission.[7] English law lays down no formal distinction between "solemn" treaties and agreements made by departments, although, in British practice, inter-governmental agreements are ratified by the Foreign Secretary. Indeed, there do not appear to be any examples of inter-departmental agreements in British practice which were not based on a prior treaty authorizing their conclusion. However, there exist certain statutory provisions which might, perhaps, be relied upon, for the purpose of showing that a basis exists for some such agreements in English municipal law.[1] The Austrian constitution of 1920 contained a provision authorizing the President to delegate his treaty-making power to a State department.[2] The constitutions of Denmark,[3] Irak,[4] and El Salavador[5] contain provisions authorizing agreements by State departments with foreign states.

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[1] Basdevant deplores the development of this practice and describes it as "uncertain and contradictory". He suggests that agreements of this technical type, although negotiated by departmental officials, should always pass, in their final form, through diplomatic channels. *Ibid.*, p. 624.

[2] Schmitz, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1933), I, p. 322.

[3] *Fontes Iuris Gentium*, Series A, Sectio 2, Tomus 1, p. 141. See Meissner, *Vollmacht und Ratifikation* (1934), pp. 16–20.

[4] *Annual Digest* (1919–22), Case No. 225; *Annual Digest* (1929–30), Cases No. 217 and No. 228.

[5] Meissner, *Vollmacht und Ratifikation* (1934), p. 26, referring to S. 106 of the Gemeinsamen Geschäftsordnung der Reichsministerien.

[6] Meissner, *op. cit.*, pp. 29 and 85. Meissner appears to base such agreements on a delegation of authority by the Head of State in accordance with customary law: *op. cit.*, p. 95.

[7] Crandall, *Treaties, their Making and Enforcement* (2nd ed. 1916), p. 121; Moore, *Political Science Quarterly* (1905), XX, p. 385. For a recent example of an agreement not a "treaty" falling within such a category see *U.S.* v. *Belmont* (1937), 301 U.S. 324. As to the use of the

The relevance of constitutional laws to the competence to make treaties has been the subject of considerable discussion of recent years.[6] For the purposes of this study the word "treaties" has been used in a generic sense and not as signifying any particular type of international agreement. The common distinctions of diplomatic practice between "treaties", "conventions", "agreements", "*modi vivendi*", "concordats", "declarations" and "pacts", have no special legal significance. Attempts to classify treaties have, accordingly, been based on subject-matter and not on form.[7] Therefore, assuming constitutional competence to make a particular agreement, its title or diplomatic character is of no consequence in municipal law. Questions of form rarely arise in municipal courts; and, when they do, the courts accept the categories of diplomatic practice. English doctrine seems to recognize that the purely formal conditions of the validity of treaties must be left to international law.[8] One might suppose that questions of form arise

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treaty-making power in relation to the constitutional guarantees of the property of the citizen, see a note by Jessup in *A.J.I.L.*, XXX (1931), p. 484. For an account of the practice of the Department of State see *The Making of Treaties and International Agreements and the Work of the Treaty Division of the Department of State*, an address by William V. Whittington, Treaty Division Department of State, before the Conference of Teachers of International Law, Washington, D.C., April 29, 1938 (United States Government Printing Office, 1938).

[1] See S. 1 of the Treasury Solicitor Act 1876, S. 1 of the Overseas Trade (Credit and Insurance) Act 1920, and SS. 4 and 87 of the Post Office Act 1908. Perhaps only the last-mentioned provides a clear example.

[2] Article 66 (2). See Bittner, p. 76.

[3] Arnold, *Treaty-Making Procedure* (1933), p. 31.

[4] *Op. cit.*, p. 44.

[5] *Op. cit.*, p. 66. But such agreements must be submitted to the legislature for ratification.

[6] See Mervyn Jones, *A.J.I.L.* (1941), vol 35, p. 462, and the literature there cited.

[7] Jellinek, *Die rechtliche Natur des Staatsverträge* (1880); McNair, *B.Y.I.L.* (1930), X, p. 105. Rapisardi Mirabelli, *Revue de droit International et de Legislation Comparée* (Third Series) (1923), IV, p. 667; Kraus, *Recueil des Cours* (1934), L (iv), p. 395. See the report of Mastny and Rundstein, *A.J.I.L.* (1926), XX, Special Supplement, pp. 204–21.

[8] Halsbury, *Laws of England*, VI, p. 520. In *The Blonde*, [1922] 1 A.C. 313, the Judicial Committee of the Privy Council observed that "although no doubt *consensus ad idem* is fundamentally necessary to an international agreement as it would be to a private offer and acceptance under municipal law it does not follow that in the intercourse of sovereign states every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon as the parties have reached the stage of affirming identical propositions." See also *Phillipson* v. *Imperial Airways Ltd.* [1939] A.C. 332, where the phrase "High Contracting Parties" is discussed by the House of Lords. Compare the observations in *The Blonde* with a decision of the Swiss Federal Tribunal in 1925 on the same point: *Annual Digest* (1925–6), Case No. 251. See for the British position, McNair, *The Law of Treaties* (1938), chapter IV.

frequently in the United States. Article VI of the Constitution refers specifically to "treaties" as being made by the President, by and with the advice and consent of the Senate. Yet, as we have seen, many international agreements are made by the President or government departments which are not concluded in this way. Furthermore, a distinction is also drawn, in Article I of the Constitution, between "Treaties, Alliances and Confederations" and "compacts and agreements". The latter may be made by States of the Union with the authorization of Congress. Yet no American court has defined a treaty for this purpose.[1] Nor has any American court held any particular treaty to be unconstitutional either for lack of competence to make it, or for lack of proper form.[2] There appears to be a vicious circle: Treaties must be ratified by the President by and with the advice and consent of the Senate. If we ask what is a treaty, for this purpose, the answer is: Any agreement which has been so ratified. Agreements which are not so ratified are presumably not part of the "supreme law of the land". Inasmuch as the President could, by using his power to make agreements which are not "treaties", largely frustrate the purpose of Article VI of the Constitution, it has been suggested that any agreements which he may make, falling under this category, are binding only on the President who makes them.[3] The Supreme Court of the United States has repeatedly declined to express an opinion as to what extent a treaty is binding or still in force. It regards these as "political questions" which fall within the competence of the Executive.[4] The same attitude, on this point, is taken by the French courts.[5] Reasons are given by the writer elsewhere[6] for accepting the view that constitutional requirements for the conclusion of treaties are operative in international law. But it seems that constitutions, which specify the competent authority to conclude agreements, leave the validity of such agreements outside judicial control. Consequently the question whether any particular agreement has in fact complied with constitutional requirements, can only be raised in an international forum; and only an international tribunal can answer it—even then, it may be thought, not without difficulty.[1] If, therefore, we are to understand the nature of agreements, other than "treaties" in the strict formal sense—inter-State agreements—we must examine international as well as municipal practice.

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[1] Wright, *The Control of American Foreign Relations* (1922), pp. 230–3.

[2] Wright, *The Control of American Foreign Relations* (1922), pp. 80, 287. In *Altman* v. *United States* (1912), 224 U.S. 583, the United States Supreme Court held that a certain document was a "commercial agreement" and not a "treaty" in the constitutional sense. Yet the court held that it was a "treaty" for the purpose of judicial review of its construction. A United States Circuit Court of Appeal has held that a postal convention was not a treaty within the meaning of the constitution *because* it was not ratified by the President as prescribed by Article VI : *Four Packages of Diamonds* v. *United States* (1919), 256 Fed. 305, digested in *Annual Digest* (1919–22), Case No. 226. See also *In re McAll's Estate, ibid.*, Case No. 126. No guidance is given by American case-law as to what precisely is a "treaty".

[3] Wright, *The Control of American Foreign Relations* (1922), pp. 235, 238, 243. Miller says that no exact definition of an executive agreement is possible : Miller, *Treaties and other International Acts of the United States of America* (1931), I, Introduction, p. 9. He describes postal conventions, which, since 1795 have been made by the Postmaster-General, under Acts of Congress, as "business arrangements between offices of transport rather than agreements between governments", *ibid.*, p. 7.

[4] *Foster* v. *Neilson* (1829) 2 Pet. 253; *Doe* v. *Braden* (1853) 16 How. 656; *Terlinden* v. *Ames* (1902) 184 U.S. 270; *Jones* v. *Walker*, 13 Fed. Cas, No. 7507; *U.S.* v. *Tobacco Factory*, 28 Fed. Cas., No. 16528.

[5] Chailley, *La Nature Juridique des Traités Internationaux* (1932), pp. 266–82; *Annual Digest*, (1923–4), Case No. 8, (1929–30), pp. 333–5, (1933–4), Case No. 181. See also the following cases in *Clunet*: (1931) pp. 391, 1103, 1111; *ibid.* (1932) pp. 960, 965, 1006; *ibid.* (1935) pp. 953, 957; *ibid.* (1936) p. 633; *ibid* (1937) p. 771; *ibip.* (1938) p. 549. See a note in *R.G.D.I.P.* (1936), XLIII, p. 486.

[6] *A.J.I.L.* (1941), vol. 35, p. 462.

Bittner enumerates several examples of "inter-departmental" agreements dealing with river drainage, canals, telegraphs, posts and railways (drawn chiefly from Austrain pre-war practice). He insists that the "subjects" bound by such agreements are not states but "state organizations".[2] On the ground that only Foreign Secretaries and diplomatic agents are recognized by custom he says that no one else can make a treaty.[3] But it cannot be inferred that such agreements do not "bind the State" merely because they do not pass through diplomatic channels. If the acts of diplomatic agents can be imputed to the State so as to bind it by "treaty" it appears reasonable that "State organizations" should be able to bind the State by an international agreement if the State—i.e. the State's law or constitution—permits it. The question is simply one of evidence or of proper authority; and it is submitted[4] that the competence to make such agreements must, in the last resort, depend on the public internal law of the states concerned. However, as already shown above, the laws of most states are silent on the subject, and, historically, it seems that such agreements are the deliberate creation of international practice, which the constitutional texts we have cited have merely recognized. For it is clear that in many cases the source of these agreements can be traced directly to a treaty negotiated in the traditional form. In such cases the subject-matter is of a technical character similar to the questions dealt with by "delegated legislation" in the modern democratic State. The inter-departmental agreements falling into this category might be regarded as analogous to the English Orders in Council made under a "Principal Act". A few examples must suffice.

An Anglo-French Postal Treaty in 1856 negotiated in the traditional form provided that "the British Post Office and the French Post Office shall determine by mutual consent the conditions upon which shall be exchanged in open mails between the respective offices of exchange letters and printed papers of every kind" and that they should "nominate by mutual consent the Offices through which the exchange of correspondence shall take place".[5] Accordingly, in pursuance of these articles, the Postmaster-General of the United Kingdom and the Director-General of the French Post Office signed "Detailed Regulations" in duplicate in Paris and London in the same year[6], and supplemented these with additional articles in 1864 and 1865 under the same authority.[1] The articles in the Principal Treaty had given power to the post offices to modify any regulations so made from time to time. The same procedural basis was created for agreements between the British and Sardinian Post Offices.[2] On the other hand, a Convention between the British and Prussian Post Offices in 1862 is not expressly based on an earlier treaty, though earlier postal arrangements had existed.[3] Nevertheless, the convention recites that "Full Powers" have been given to the departmental officials who signed, by the chiefs of their departments—the British Postmaster-General and the Prussian Minister for Trade.[4] Again competence to make the Detailed Regulations of 1874 in the matter of postal services was clearly based on the Postal Union Treaty signed on the same day by plenipotentiaries "subject to ratification". Twenty-one states were parties to the treaty. The Regulations were declared to have been made "in the Name of their respective Administrations".[5] In the same way, the International Telegraph Convention, 1875, gave authority to the administrations concerned to make agreements, by which, by Article 11 of the Convention, the parties agreed to be bound. An inter-departmental statute was drawn up by the administrations concerned.[6] In 1897 a multipartite Parcel Posts Convention authorized administrations to make agreements, and an inter-departmental statute was signed.[7] An inter-governmental agreement of 1902 between Great Britain and Chile (both parties to the 1897 Convention) was based on the 1897 Convention.[8] Similarly the "arrangement administratif" of 1906 between France and Bulgaria "relatif à l'importation de graines de vers à soie en Bulgarie"[9] (which is cited by Bittner)[10] finds its procedural law in the Franco-Bulgarian Treaty of Navigation, 1905,[11] upon which, indeed, the "arrangement" of 1906 is declared to be based. Some of the early technical agreements are inter-governmental, and are concluded in pursuance of Full Powers. Thus it was, with railway agreements made by Serbia in 1887, with Turkey and Bulgaria.[12] Yet these agreements contain detailed clauses authorizing agreements between the "administrations interested", which were to have the effect of modifying the Principal Treaty. The Railway Convention of 1923 recognizes "that international agreement in respect of railway transport has already been the subject of many special conventions between states and between railway administrations". Article 9 of the statute annexed obliges the Contracting States "to urge the railway administrations under their sovereignty whose lines form a continuous system of the same gauge to enter into Agreements with each other", etc.[1] But it does not appear from the convention or the statute that these agreements are to be deemed effective to modify the statute. Nor do the early railway conventions of 1881[2] and 1890[3] appear to have created any such competence. On the other hand, the Universal Postal Convention, 1929 (which took the form of an inter-State agreement subject to ratification) gave authority to the "Administrations" "to draw up by mutual agreement . . . the measures of order and detail for the execution of the convention and the Agreements". Article (5) provides: "the Administrations are authorized to make the necessary agreements among themselves relative to questions which do not interest the whole of the Union provided that they do not introduce any provisions less favourable than those laid down by the Acts of the Union." But revision of the Convention itself is to be effected by a Congress of "Plenipotentiary delegates provided with the necessary credentials by their governments" (Article 12). Regulations in pursuance of Article 4 of the Principal Treaty were drawn up "in the name of their respective Administrations".[4] But both these documents and the final protocols attached to them were in fact signed by plenipotentiaries of governments; and all of them appear to have a strictly diplomatic character.

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[1] Compare the somewhat rigid view of Chailley, who defines the treaty as "the constitutional procedure according to which are created juridical norms common to several states". He says that this definition is valid not only for the internal order but is fully applicable in the domain of international law: *op. cit.*, p. 331. But there is, quite clearly, no such procedure apart from international law and practice. The result of Chailley's view is rather confusing when extended to cover the *material* as well as the *formal* validity of treaties. See generally Chailley, *op. cit.*, pp. 243–328.

[2] *Bittner*, p. 189, where several examples are given, and see notes 193 and 194 citing one very early example in 1828.

[3] *Bittner*, p. 56 and n. 195. He refers to a case in 1866 when members of a Mixed Financial Commission signed a final agreement. He describes the case as "irregular", n. 197. See also examples cited by Basdevant, *Recueil des Cours* (1926), XV, pp. 623–4.

[4] This position is developed by the writer in an article in *A.J.I.L.* (1941), vol. 35, p. 462. See also Chailley, *La Nature Juridique des Traités Internationaux* (1932), pp. 210–15, and Scelle, *Précis de droit des gens* (1934), II, pp. 460–1.

[5] Articles 31 and 36: *S.P.*, XLVI, p. 195.

[6] *S.P.*, LII, p. 1123.

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[1] *S.P.*, LIV, p. 155; *S.P.*, LV, p. 50.

[2] *S.P.*, LV, p. 1165.

[3] A Postal Treaty between Prussia and Great Britain in 1846 gave power by Article XXXV to make inter-departmental arrangements. In 1849 such an arrangement was made reciting that it was in pursuance of Article XXV: Martens, *N.R.G.*, XIV, p. 326.

[4] *S.P.*, LV, p. 1148.

[5] *S.P.*, LXV, p. 13.

[6] *S.P.*, LXVI, p. 19. An inter-departmental agrement on submarine cables was made in 1926 under Article 17 of this Convention: *L.N.T.S.*, I, p. 296.

[7] *S.P.*, XC, p. 1104.

[8] *S.P.*, XCV, p. 23.

[9] Martens, *N.R.G.* (3rd series), VIII, p. 389.

[10] *Bittner*, p. 55, n. 190.

[11] Martens, *N.R.G.* (2nd series), XXXV, p. 3.

[12] Martens, *N.R.G.* (2nd series), XV, pp. 564–82. Or they may be inter-governmental in form and signed by administrative chiefs, e.g., Franco-German arrangement concerning the Marne Canal; Martens, *N.R.G.* (2nd series), X, p. 451. Cf. *B.T.S.*, 1892, No. 2; *B.T.S.*, 1893, No. 5.

It can only be in virtue of an international practice recognizing an administrative competence to bind the State that inter-departmental agreements become legally binding. As has already been pointed out, the necessity of invoking such a practice does not frequently arise, as many such agreements can be based on the procedural law established in a Principal Treaty. But where the necessity does arise it may be said that, in a restricted class of international business, there is a tendency to regard such a practice as established.[5] Where inter-departmental agreements are made relating to a subject-matter falling outside this field, the important question is whether they purport or not to be made on behalf of the State. If the answer is in the affirmative it may be presumed (laying aside questions of constitutional limitations on the treaty-making power which may arise in the case of any international agreement whatever its form) that there is authority to make them. No doubt this authority can in most cases be proved by satisfactory evidence of delegation. But the full powers or other documents proving such authority will not generally be in the traditional form.

It may be stated as a general proposition that the procedure governing the conclusion of international agreements has become much less formal during the last hundred years. Not only have new forms of agreement developed independently of the traditional "inter-State" type, but even some of the formalities associated with this type are obsolescent. Among these formalities may be mentioned for instance the use of Full Powers in connection with ratification and accession.[1] It used to be the practice until late in the nineteenth century to issue Full Powers authorizing an agent to communicate Acts and Acceptance and Ratification. This at any rate is no longer the British practice[2] and appears also to have been abandoned by Germany except in special cases.[3] The possession of the appropriate document is deemed sufficient evidence of authority to communicate it. It was also formerly usual, in the case of an accession to a treaty, for the Government of the State to which it was communicated to execute an Act of Acceptance for the communication of which a Full Power was deemed necessary.[4] Ratifications of these acts were then exchanged. To-day this multiplicity of documents has given way to a simple procedure. The practice of the League of Nations up to the outbreak of the present war was to require Full Powers of delegates to the Assembly but not of members of the Council. This was in general accord with traditional diplomatic practice, for members of the Council were frequently Ministers for Foreign Affairs who are usually in possession of "general" Full Powers or may be assumed to hold a general authority on behalf of their governments. The Assembly on the other hand was assimilated in principle to a diplomatic conference composed of special delegates who were required to produce Full Powers to the Committee on Credentials.[5] The delegates to the International Labour Conference receive, not Full Powers, but authority to represent the employers, workers, or the government as the case may be.[6] Resolutions passed by the Assembly or Council of the League or Conventions adopted by the International Labour Conference might in certain circumstances produce legal obligations as firm as those contracted by the traditional type of treaty. As regards International Labour Conventions they are not inter-State treaties and can hardly be described even as agreements in the ordinary sense of the word. They are written instruments passed by resolutions of a two-thirds majority of the International Labour Conference in which employers, workers, and governments are represented. They can hardly be described therefore as agreements between governments in point of substance or "negotiation", though they are certainly inter-governmental agreements in point of form and are "ratified" by governments.[7]

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[1] Hudson, *International Legislation* (1931), II, p. 1130.

[2] Martens, *N.R.G.* (2nd series), XIII, p. 2.

[3] Martens, *N.R.G.* (2nd series), XIX, p. 289.

[4] Hudson, *op. cit.*, IV, pp. 2869–2993. See also the agreement between the British Air Ministry and the Austrian Federal Ministry of Commerce made in 1932, and based upon Article 1, paragraph 2, of the Air Navigation Convention of that year: *B.T.S.* (1933), Nos. 7 and 35. See also a postal agreement of 1926 based on the Telegraphic Convention, 1875: *S.P.*, LXVI, p. 19.

[5] cf. Meissner, *Vollmacht und Ratifikation* (1934), p. 21. Basdevant gives reasons for regarding these agreements from a juridical standpoint: *Recueil des Cours* (1926), XV, pp. 641–2.

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[1] Some interesting remarks on the decreasing importance of Full Powers are made by Dunn, *Practice and Procedure of International Conferences* (1929), pp. 169–73, 205–6. No Full Powers were issued for the World Economic Conference, 1927: Dunn, *op. cit.*, pp. 43–4. See also McNair, *Recueil des Cours* (1933), XLIII, pp. 298 *et seq.*

[2] Satow, *Diplomatic Practice* (3rd ed., 1932), p. 413.

[3] Meissner, *Vollmacht und Ratifikation* (1936), p. 61. But see the examples of treaties made in 1925 and 1927 in which full powers were used for this purpose, *ibid.*, n. 41. Genet gives an example of an Italian Full Power issued apparently in recent times for the purpose of exchanging ratifications. Gênet, *Traité de Diplomatie et de Droit Diplomatique* (1931), III, p. 436, n. 428. It is not clear whether this is still the Italian practice. Full Powers were in use for this purpose by the United States as late as 1922: U.S. Foreign Relations (1922), vol I, 975.

[4] Examples may be found in treaty collections of the eighteenth and nineteenth centuries. See, e.g., F. A. Wenck, *Codex Juris Gentium* (1781), vol. I, pp. 149–50.

[5] The analogy of a diplomatic conference is not entirely satisfactory, but it is sound in so far as members of the Assembly were representatives of "Sovereign" States. See, however, Mr. Beckett's remarks: *League of Nations Special Supplement*, No. 126, pp. 49–50.

[6] McNair, *The Law of Treaties* (1938), pp. 64, 89. The importance of the International Labour Organisation from the general standpoint of the development of international law as a system is discussed in the writings of C. W. Jenks. See, for example, his paper on "The Significance for International Law of the Tripartite Organisation of the International Labour Organisation", *Transactions of the Grotius Society*, vol. 22 (1936), pp. 45–81.

[7] But British "ratifications" of International Labour Conventions take the form of an Order in Council "confirming" them: McNair, *The Law of Treaties* (1938), pp. 89, 91.

Note.—The question of authority to bind the State by an agreement concluded otherwise than in the traditional diplomatic form becomes important when the agreement touches on territorial matters or upon issues of high international policy. The legal nature of any such agreement must depend on the circumstances, the intention to create legal obligations, etc. A recent example of an agreement to which on the face of it states were parties, but which was signed by heads of Governments, is the Munich Agreement of September 9, 1938. (Cmd. 5848.) This agreement begins "Germany, the United Kingdom, France, and Italy, taking into consideration the agreement which has already been reached in principle for the cession to Germany of the Sudeten German territory have agreed on the following terms". The agreement is signed by Adolf Hitler, Neville Chamberlain, Edouard Daladier, and Benito Mussolini—that is to say by the Heads of the respective Governments concerned. The agreement clearly created legal obligations (from which, however, the United Kingdom considers itself now released—Mr. Eden's Note to the Czech Minister of August 5, 1942: *A.J.I.L.* (1942), vol. 36, *Official Documents*, p. 2). The agreement does not recite the authority in virtue of which it was made; nor was it subject to any ratification. As a general rule conferences between Heads of Governments are confined to the discussion of general principles of policy, the actual embodiment of the agreement in legally binding form being executed through diplomatic channels. At the most such conferences have been followed by an official communiqué describing what has transpired. The "Atlantic Charter" of August 1941, appears at first sight to be a document of this kind. It states that the President of the United States and Prime Minister Mr. Churchill representing His Majesty's Government in the United Kingdom have agreed on "certain common principles in the national policies of their respective governments on which they base their high hopes of a better future for the world", (*A.J.I.L.* (1941), vol. 35, *Official Documents*, p. 191). This and the rest of the document is not couched in the language of legal obligation. (Mr. Attlee, however, appeared to assent—though ambiguously—to the view that the document had "the status of a treaty" (378 H.C.Deb. 5. S., Col. 510). A declaration of this kind may, however, by being communicated to other Powers, create a legal agreement. During the war of 1914–18, the Allied Powers communicated in their Memorandum to the German Government of November 5, 1918, their acceptance, subject to certain modifications, of President Wilson's Fourteen Points as the basis of peace. The German Government subsequently maintained that the acceptance by it of an armistice on these terms created a *pactum de contrahendo.* (See Temperley, *History of the Peace Conference of Paris*, vol. II, p. 246.)

The Agreement for the use and operation of Naval and Air Bases between Great Britain and the United States of March 27, 1941, is in the form of an inter-governmental agreement and recites that "the undersigned being duly authorized to that effect have agreed as follows". The Agreement is signed on behalf of the United Kingdom by Winston Churchill, Prime Minister, Lord Cranborne, Secretary of State for the Dominions, and Lord Moyne, Secretary of State for the Colonies (*A.J.I.L.* (1941), vol. 35, *Official Documents*, p. 134). It is to be noted that the Secretary of State for Foreign Affairs was not a signatory.

An agreement which appears to be entirely *sui generis* is that signed on April 9, 1941, relative to the defence of Greenland. It was signed by Secretary of State Hull "acting on behalf of the Government of the United States of America" and Mr. Henrik de Kauffman, the Danish Minister in Washington, "acting on behalf of His Majesty the King of Denmark as Sovereign of Greenland whose authorities in Greenland have concurred therein". It is not altogether clear who the ultimate parties to this agreement were. On the one hand it must be assumed that Secretary Hull represented the Government of the United States and that the agreement was not, according to the law of the United States, a "treaty". On the other hand, it does not appear that Mr. de Kauffman was authorized by either His Majesty the King of Denmark or the Danish Government to sign the agreement. Indeed, no reference is made in the text of the agreement to any authority having been granted to either party to sign. The agreement was repudiated by the Danish Government, who said that Mr. de Kauffman had never been authorized to sign the agreement for Denmark or for the Danish Government. (*A.J.I.L.* (1941), vol. 35, p. 506.) It cannot be denied that Mr. de Kauffman had an accredited status, for he presented his credentials as Danish Minister to the United States Government on August 26, 1939. So far as the United States were concerned he continued up to the time of the signature of the agreement to be recognized in that capacity. The Danish Government did nothing to cast any doubt upon Mr. de Kauffman's status until after the agreement was signed, when they declared that he was recalled. The existence of diplomatic status is not, however, enough for the purpose of negotiating and signing an international agreement. According to customary international law specific authority (a "Special Full Power") is required from the Government or State whose agent signs the agreement. Mr. de Kauffman purported to be acting on behalf of His Majesty the King of Denmark, but there is nothing to show that His Majesty authorized him so to act on his behalf. In so far therefore as the "agreement" had any legal effect it could only be as a unilateral declaration by the United States. The exact legal effect of such a declaration in the circumstances then prevailing falls outside the scope of the present article.

The Moscow Three Power Declaration on general security published in Moscow on November 1, 1943, was in form an inter-governmental agreement. The text begins: "The Governments of the United States, the United Kingdom, the U.S.S.R. and China . . . jointly declare." It is not clear whether this declaration was actually signed, but the Governments concerned were represented at the Moscow Conference by their respective Foreign Secretaries (London *Times*, November 2, 1943), who must certainly be regarded as having the necessary authority *ipso jure* to bind their Governments by international agreements. It has been doubted, however, whether this declaration is to be regarded in the United States as a treaty or as an executive agreement (London *Times*, November 4, 1943).

IMPLIED RECOGNITION

THE question of implied recognition resolves itself into an inquiry as to the kind and type of conduct which, in the absence of clear indications to the contrary, the law will interpret as amounting to recognition. How far does the conclusion of a treaty with a hitherto unrecognized government or State, or the appointment of a diplomatic or consular agent to such government or State, or participation in a conference attended by it, amount conclusively to recognition of statehood or governmental capacity? How far does the use of a mode of address or repeated or sporadic acts of intercourse have that effect? How far does passive acquiescence in the exercise of all or some belligerent rights, especially when coupled with a substantial measure of official intercourse with the insurgents, amount to an implied recognition of belligerency? The frequency with which these questions arise shows that they are not of a merely theoretical nature.

There are many occasions on which the law, municipal or international, finds it necessary, in the interests of good faith and fair dealing, to imply intention from conduct either active or passive. But to imply an intention to consent or to promise is not to make the actual existence of such intention legally irrelevant. There is, as a rule, no conduct, however conclusive in ordinary circumstances, the normal legal consequences of which cannot be averted or interpreted by a clear manifestation of a contrary intention. Two examples in the law of contract will illustrate the position. As a rule the law requires an express offer and acceptance as a condition of a contract. On occasions, however, the law will infer from the conduct of the parties the intention to conclude a binding agreement. If I permit a person to do work for me in circumstances in which he may reasonably infer that I did not intend him to give his services for nothing, I shall be deemed to have entered into a contract and, in consequence, held liable to pay for the work done. But no such results will arise if I clearly manifest my intention not to enter into a contract. Or the law may imply a condition in the contract. Thus, according to Section 14 (1) of the English Sale of Goods Act of 1893, where the buyer makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and where the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose. But a clear caveat on the part of the seller will do away with that presumption of the law.

These examples explain the reasons for the determination of the law to imply intention in the interests of the security of transactions and of good faith. A substantial part of the law of estoppel belongs to the same category. However, in all these cases there is nothing artificial or purely technical in the intervention of the law. It does not spring a surprise upon an unwilling party. In particular, it does not compel him to abide by consequences which he clearly wished to avoid, which the other party knew he did not intend, and which it is not in the interest of security of transactions to presume. In Roman law, though the implied warranty of livestock dealers for serious defects was of a penal character, it was possible to contract out of it. The same considerations must apply to international law. They must apply here for the special reason that rigid presumptions and formal inferences cannot be admitted without exacting proof in a system of law in which freedom of action and the absence of imposed obligations still form one of the bases of positive law.

There are few branches of international law in which the adoption of a presumption can have more serious legal consequences than in the matter of recognition. Recognition, properly conceived, is a duty whose fulfilment must not be withheld when the required conditions are present. When granted, it is the starting-point of rights of statehood, of governmental capacity, of belligerency. These rights are inoperative so long as, in the exercise of a necessarily wide discretion, the State has declined to grant it. To say that, in matters of such import, the results of recognition follow upon certain actions of States, regardless of their intention or even of an intimation to the contrary, is to lay down a rule of the utmost gravity. Nothing short of a compelling legal principle or of an acknowledged and unequivocal prcatice of States can be sufficient for the admission of any such rule as a rule of international law. As often happens, the doctrine of implied recognition has been more conspicuous in the writings of authors than in the practice of States. In the literature of international law it has often appeared under the more innocuous name of modes of recognition. It is true that recognition may be granted in a manner other than an express and formal declaration to that effect. In this sense we are justified in referring to various modes of recognition. But it is permissible to speak of modes of recognition only if we keep in mind the fact that we are entitled to treat a particular act as amounting to recognition only when there is no doubt as to the intention to recognize. Otherwise, and this is what happens with perplexing regularity, we run the danger of introducing the vagaries of implied recognition through the backdoor of modes of recognition. Recognition is primarily and essentially a matter of intention. The latter cannot be replaced by questionable inferences from conduct. Such inferences are particularly objectionable and misleading when the general attitude of the State in question points to its continued determination to deny recognition.

The best method of approaching the subject is to survey the various so-called modes of recognition—or, what is largely the same, the various forms of implied recognition—and to examine how far they amount to recognition in each particular case.

The Conclusion of Treaties

The conclusion of a treaty,[1] and even the appointment of agents charged with the task of negotiating and concluding a treaty,[2] have often been described in general terms as evidence of recognition of a State or of a government. Such statements are probably too wide. They must be considered separately in relation to bilateral and multilateral treaties.

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[1] See Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht* (1928), p. 48; Oppenheim, *International Law*, vol. I (4th ed., 1928), pp. 145, 146; Scalfati, *Il riconoscimento di Stati nel diritto internazionale* (1938), pp. 254, 255 (with numerous other references).

[2] See Moore, *Digest of International Law*, I, p. 90, on the recognition of Ecuador by the United States in 1838 and of Paraguay in 1852 (p. 91).

(*a*) *Multilateral Treaties.* On the face of it there would appear to be no difference, for the purpose of recognition, between the conclusion of a multilateral and of a bilateral treaty. In both, logic would seem to demand that a State cannot become a party to a treaty with a State or government which it does not recognize—that is to say, whose existence it denies—and that therefore the conclusion of a treaty amounts to recognition. Occasional pronouncements by governments substantiate that opinion. However, the logic of that view is too rigid to be acceptable. The purpose of a multilateral treaty is not frustrated nor are its clauses necessarily rendered meaningless if its operation does not extend mutually to all parties to the treaty. If State A refuses to recognize State B and to have effective treaty relations with it, that is no reason why both these States should not, in the same treaty, enter into relations with other States. The cumbersome alternative would be to conclude two sets of multilateral treaties—one with State A, the other with State B, as a party. Moreover, when the number of States (or governments) to which recognition is refused is considerable, the number of the required multilateral conventions would grow in proportion.

In fact it may be doubted whether mere considerations of logic render it absurd for a State to participate in a general treaty although it refuses to recognize one or more parties to it. There is no compelling reason why there should be a full contractual relation between each contracting party and all other signatories to the treaty. There is no such relation when the operation of some provisions of the treaty or the treaty as a whole is excluded as the result of reservations extending to all or some of the contracting parties—as was the case, for instance, when in signing the Opional Clause of the Statute of the Permanent Court of International Justice Great Britian excepted from its operation disputes with the members of the British Commonwealth of Nations. The result of that reservation was the same as if Great Britain had declared that she did not recognize the Dominions or their governments and therefore refused to apply as between herself and them the provisions of the multilateral treaty as constituted by the Optional Clause. When in consequence of war the operation of a multilateral treaty is suspended or altogether eliminated as between the belligerents, it still remains effective as amongst the other parties. The list of signatories appearing in the Preamble can conveniently be conceived of as a framework; it is not an essential part of the treaty. When therefore a State agrees to become a party to a multilateral treaty, one or more of the parties to which it does not recognize, the treaty remains inoperative as between the parties in question, but probably comes into effect as between them as soon as recognition is granted.[1] This solution is preferable to the alternative of either refraining from participation in the conclusion of multilateral treaties or being driven into granting recognition.

On occasions, doubts arising under this head have been resolved in advance by the addition of an express rider to the effect that participation in the treaty does not amount to recognition. This course has often, but not invariably, been adopted by the United States.[1] In fact, the somewhat hesitating practice of the United States is an instructive example of the fascination exercised by the theory of implied recognition.[2] The reservation of non-recognition is appended in some multilateral treaties and omitted in others—which latter course represents the more recent practice of the United States. Occasionally a distinction is made between the joint signature of a multilateral treaty (said to require a reservation expressly repudiating the intention to recognize) and adherence to it on the part of the unrecognized State (which, it has been rightly said, cannot be given the easy option of obtaining recognition, thrust upon the unwilling State, by the act of adhesion). On other occasions the State Department has tended to distinguish between treaties requiring contact, exchange of information and co-operation between signatories and, therefore, believed to imply recognition, and treaties where no such contact is required—a reason the inadequacy of which is illustrated by the fact that international practice shows constantly instances of administrative contact between governments notwithstanding the absence of recognition.

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[1] The position is analogous to that of the interruption of the operation of a treaty as the result of refusal to recognize the government of a State with which the treaty had been previously concluded. Thus, for instance, a Dutch court held in 1931 (*Shipoff* v. *Elte: Annual Digest of Public International Law Cases,* 1931–2, Case No. 17) that although the Convention on Civil Procedure of July 17, 1905, remained in force as between Holland and Russia, it was not operative on account of the Dutch refusal to recognize the Soviet Government. But see *ibid.,* Case No. 16, for a different decision of another Dutch court.

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[1] When signing the International Sanitary Convention of June 21, 1926, the United States made the following declaration: "The Plenipotentiaries of the United States of America formally declare that their signing of the International Sanitary Convention of this date is not to be construed to mean that the United States of America recognizes a régime or entity acting as Government of a signatory or adhering Power when that régime or entity is not recognized by the United States as the Government of that Power. They further declare that the participation of the United States of America in the International Sanitary Convention of this date does not involve any contractual obligation on the part of the United States to a signatory or adhering Power represented by a régime or entity which the United States does not recognize as representing the Government of that Power, *until it is represented by a Government recognized by the United States.*" (Hudson, *International Legislation*, vol. III, p. 1975.) The passage reproduced in italics confirms the possibility of the construction put forward above according to which the absence of recognition results merely in the postponement of the operation of the treaty. It is significant that the United States was the only State which made a declaration of this nature although a number of other contracting parties were in a similar position. When signing, on July 13, 1931, the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, the United States made an identical declaration (*League of Nations Treaty Series*, vol. 139, p. 336). It is of interest to note the reply which Salvador made to that declaration: "The Republic of Salvador states that it disagrees with the reservations embodied in Nos. 5 and 6 of the declarations made by the plenipotentiaries of the United States of America regarding Governments not recognized by the Government of that country; in its opinion, those reservations constitute an infringement of the national sovereignty of Salvador, whose present Government, though not as yet recognized by the United States Government, has been recognized by the majority of the civilized countries of the world. . . . As it respects the internal régimes of other nations, the Republic of Salvador considers that the Convention in question, being of strictly hygienic and humanitarian character, does not offer a suitable occasion to formulate such political reservations as have called forth this comment." (*Ibid.*, p. 343.)

When the Lausanne Straits Convention of July 24, 1923, was signed, elaborate precautions were taken in order to prevent the possibility of the signature of the Convention being interpreted as recognition *de jure*. Thus while the full powers of the Russian plenipotentiaries were described to have been issued on behalf of "the Federated Soviet Republic of Russia, the Ukraine and Georgia", the Convention was signed on behalf of Russia. (Hudson, *op. cit.*, vol. II, p. 1028.)

Reservations similar to that made when signing the International Sanitary Convention were made by the United States on other occasions, such as the Convention for the Safety of Life at Sea of 1922 and the Narcotic Drugs Convention of 1931. It made no such reservation on other occasions such as the signing of the Convention on the Régime of the Straits of 1923; the Convention on the Suppression of Counterfeiting Currency of 1929; the Postal Conventions of 1924 and 1929; the Telecommunications Convention of 1932; and the International Air Sanitary Convention of 1932.

See also, as to the Universal Postal Convention of August 28, 1924, Hudson in *American Journal of International Law*, XXIII (1929), p. 130: and see *ibid.*, p. 132, as to the General Treaty for the Renunciation of War of August 27, 1928, which was ratified by the United States without any reservations relating to recognition. For a detailed explanation of the attitude of the State Department in this connection with regard to any future adherence by Soviet Russia see Hackworth, *Digest of International Law*, vol. I (1940), p. 353.

On June 11, 1903, Great Britain broke off diplomatic relations with Serbia following upon the murder of the Serbian King and Queen. On July 10, 1903, Great Britain and Serbia became parties to a *Règlement* annexed to the Telegraphic Convention of St. Petersburg of July 22, 1875.

[2] For a survey of that practice see Hackworth, *op. cit.*, pp. 347–55.

The legal position with respect to multilateral treaties may be correctly summarized to the effect that neither signature nor adherence on the part either of the non-recognizing or the unrecognized State result by themselves in bringing about recognition. Any reservations disclaiming the intention to recognize are appended *ex abundante cautela* and do not amount to an indirect admission of the doctrine of implied recognition in this respect.

The view of the Advisory Committee of the Assembly set up in connection with the non-recognition of Manchukuo was that participation in multilateral treaties, both closed conventions and those open to future adhesion, does not imply recognition. But the Committee was of the opinion that it was in the spirit of the policy or of the obligation of non-recognition to discourage participation of the unrecognized State".[1]

(*b*) *Bilateral Treaties.* In the case of bilateral treaties the presumption of recognition appears to be cogent to the point of being conclusive. While a multilateral treaty may be fully operative as between governments which recognize one another although it is in abeyance as between others, no such situation is possible in a bilateral treaty. Yet even in such cases there is no absolutely compelling reason to assume that a contractual relation is tantamount to recognition. There are intermediate stages between full recognition and the total absence of contractual relations. The very absence of normal relations which follows from the refusal of recognition may necessitate temporary arrangements and agreements. In fact, so long as we retain in mind the essential nature and purpose of recognition, there is nothing necessarily illogical in the conclusion of an agreement with an unrecognized State or government. Recognition as a State implies that in the opinion of the recognizing State the nascent community possesses the requirements of statehood and is therefore a normal subject of international rights and duties. Recognition as a government implies that the recognized government possesses the necessary qualifications to represent the State in question. In both cases, the result of recognition is the conferment of a status, which means a variety of rights and obligations flowing from statehood or governmental capacity. However, independently of any general recognition, a community claiming to be a State or an authority claiming to be a government may enjoy rights—including the faculty to enter into engagements—to the extent to which they are conceded by other States. It is merely the current view that only fully recognized States can be subjects of international rights and duties which prompts the contrary opinion. The existing State or States, by concluding an arrangement with the community or authority in question, admit, *pro tanto*, their contractual capacity in the domain of the treaty-making power while refusing recognition for any other purpose.[2]

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[1] *League of Nations, Official Journal*, Special Supplement, No. 113, pp. 11, 12.

[2] When Dr. Baty refers (in *American Journal of International Law*, XXX (1936), p. 380) to "the heretical doctrine that acts of recognition can be contradicted by words", he is probably

For these reasons it is doubtful whether the conclusion of even a bilateral treaty necessarily implies recognition. On March 23, 1935, the governments of Manchukuo and the Union of Soviet Socialist Republics concluded an Agreement for the cession to Manchukuo of the rights of Russia concerning the North Manchurian Railway (Chinese Eastern Railway). To that Agreement there was annexed a detailed protocol providing for the purchase of goods by Soviet Russia from Manchukuo and Japan in lieu of payment for the railway.[1] The Agreement and Protocol were intended to cope with a situation likely to cause friction between Soviet Russia and Japan, but it would be inaccurate to maintain that, beyond the admission of the existence of a government claiming to represent an independent State, any other recognition was intended or given. In fact the Agreement was concluded in Tokyo and the principal Russian signatory was the Russian diplomatic representative accredited to the Japanese Government. No Russian diplomatic representative was at that time accredited to the body styling itself the Government of Manchukuo. Between 1918 and 1920, at a time when neither *de jure* nor *de facto* recognition had been granted, Soviet Russia concluded a number of agreements with various States with regard to repatriation of prisoners of war and other matters. Thus on February 12, 1920, an agreement was concluded at Copenhagen between "His Majesty's Government and the Soviet Government of Russia" for the exchange of prisoners of war. On September 7, 1920, the British Foreign Office forwarded the text of the agreement to the Secretariat of the League of Nations for registration, in accordance with Article 18 of the Covenant.[2] On November 20, 1920, the Foreign Office, in connection with the proceedings in *Luther* v. *Sagor*, stated that "His Majesty's Government have never officially recognized the Soviet Government in any way".[3] It was only at a later date, on April 20, 1921, after the conclusion of the Trade Agreement of March 16, 1921, that the Foreign Office was in the position to inform the parties that "His Majesty's Government recognize the Soviet Government as the *de facto* Government of Russia".[4] Similar agreements were concluded between Soviet Russia and other States at a time when they denied the former both *de facto* and *de jure* recognition. Some of the agreements went beyond providing for the repatriation of prisoners of war.[2] Thus in the Agreement with Hungary, signed on July 28, 1920, the Contracting Parties agreed "not to take any military action against each other . . . in a civil war, and not to assist the enemies of the other either directly or indirectly".[5]

[*Note continued from previous page.*]

begging the question. Recognition is a matter of intention of governments rather than of construction by writers. There is nothing "absurd" (*ibid.*, p. 379) in the fact that conclusion of a treaty is accompanied by a denial of "complete statehood". The difficulty lies in the suggestion that short of recognition of complete statehood no legal relationship is possible at all. For a cogent refutation of any such suggestion see Hudson, "Recognition and Multilateral Treaties", in *American Journal of International Law*, 23 (1929), p. 128, and Jaffe, *Judicial Aspects of Foreign Relations* (1933), pp. 113–18.

[1] For the text of both see *American Journal of International Law*, XXX (1936), Supplement, pp. 85 and 97 respectively.

[2] *League of Nations Treaty Series*, vol. I, p. 264.

[3] [1921] 1 K.B. 456.

[4] *Luther* v. *Sagor* [1921] 3 K.B. 536.

[5] See for an enumeration and discussion of some of these treaties Jaffe, *Judicial Aspects of Foreign Relations* (1933), pp. 114, 115, and Taracouzio, *The Soviet Union and International Law* (1935), pp. 255, 256.

If the reason for denying recognition were simply—as perhaps ought to be the case—that the Government or the State to which recognition is denied does not exist in fact or in law, then it might be easier to accept the view that any contact which is logically impossible without assuming the existence of the government or State in question amounts to recognition. But recognition is often denied for other reasons. The refusal of recognition has occasionally been coupled with the admission that the State or government to which recognition is refused does in fact exist. Of this the statement of the Department of State in the case of *Salimoff* v. *Standard Oil Company*[1] is an instructive example. If recognition is refused for reasons other than the non-existence of the unrecognized State or government, then it is difficult to see how contact with it for limited purposes, including the conclusion of agreements, necessarily implies recognition.

If the conclusion of a treaty were tantamount to recognition, it would follow that the appointment of agents or plenipotentiaries for that purpose has the same effect. For by appointing them, the State in question would signify that it regards the other party as capable of concluding a treaty regardless of whether the negotiations actually lead to its conclusion. Yet the appointment of agents entrusted with the negotiation of an agreement is not sufficient evidence of the intention to recognize. In 1920 Great Britain received M. Krassin, of Soviet Russia, for the purpose of negotiating a trade agreement, but, as mentioned above, the British Foreign Office declined to admit that recognition *de facto* or *de jure* had taken place. It stated that the British Government had merely "assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia".[2] The practice of the United States uniformly confirms the view that though, in general, the conclusion of a treaty implies recognition, the appointment of agents for that purpose does not have that effect.[3] In a sense it may be accurately argued that far from recognition being legitimately implied from the treaty, it is recognition which confers upon the agreement the character of a treaty. This apparently was the view of the Canadian Government in connection with the complaint put forward in 1923 by the Iroquois Indians. The latter contended that they were a State within the meaning of Article 17 of the Covenant of the League of Nations and relied for that purpose on their implied recognition resulting from the conclusion of various "treaties". The Canadian view was that "naturally and obviously it was not the intention in this or preceding 'treaties' to recognize or to infer the existence of any independent or sovereign status of the Indians concerned".[1]

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[1] (1933), 262 N.Y.S. 693; 262 N.Y. 220.

[2] As stated in the communication of the Foreign Office in *Luther* v. *Sagor* [1921], 1 K.B. 456.

[3] See, as to intercourse with unrecognized governments, Houghton in *Indiana Law Review* IV (1928–9), p. 519, and in *Minnesota Law Review*, XIII (1928–9), p. 216. In 1921 the United States insisted on negotiating and signing a Convention with Mexico before they recognized the government: *United States Foreign Relations*, 1921 (II), pp. 412 *et seq.*, 418 *et seq.* "In entering into this treaty with you recognition would be effected, ipso facto", wrote President Harding to General Obregon on July 21, 1921: *ibid.*, p. 421. In 1922 the Mexican Government of General Obregon, at that time not recognized by the United States, was willing to regard the signature of a claims convention with the United States as implying recognition : see *ibid.*, pp. 639, 674.

For an example of protracted negotiations with the unrecognized Government of Mexico in 1921 and 1922 for the conclusion of a Treaty of Amity and Commerce and other conventions see *ibid.*, pp. 397, 508, 511, and *ibid.*, 1922 (II), pp. 639 *et seq.* Secretary of State Hughes wrote at that time to the Chargé in Mexico :

"The question of recognition is a subordinate one, but there will be no difficulty as to this, for if General Obregon is ready to negotiate a proper treaty it is drawn so as to be negotiated with him and the making of the treaty in proper form will accomplish the recognition of the Government that makes it. In short, when it appears that there is a government in Mexico willing to bind itself to the discharge of primary international obligations concurrently with that act its recognition will take place": *ibid.*, 1921 (II), p. 407.

On the other hand it is clear that the conclusion of a bilateral treaty is a proper mode of recognition in all cases in which there is no reasonable doubt as to the intention of the parties on the subject. This would apply in particular to such treaties as a comprehensive treaty of commerce and navigation or a treaty of alliance. Occasions may arise when for political reasons a State may choose to grant recognition by means of concluding a treaty of this character in circumstances which leave no doubt as to its intention to grant recognition. This will be the case whenever express recognition is deemed to be inexpedient as likely to offend the susceptibilities of the parent or other States. These were the reasons which in 1825 prompted Canning to insist on this mode of recognition with regard to the Latin-American Republics. The relevant part of his despatch merits quotation. He said:

> "My opinion and my language have always been that the signature of a treaty by a Plenipotentiary of His Majesty with the Plenipotentiary of a New State, which last-mentioned Plenipotentiary is designated in the Preamble to such treaty *as* the Plenipotentiary of that New State, described by its proper style (whether monarchy or republic), was in itself an effective and valid recognition of that State by His Majesty, and as valid as if the words 'His Majesty recognizes' were *totidem litteris* introduced into it. I also thought, and continue to think, this mode of recognition better calculated for the advantage and dignity of the State to be recognized than any form of words distinctly expressing Recognition; more for its dignity, because the assumed independence is therein admitted, not created; and more for its advantage, because as nothing is so desirable for the New State as that other Governments should follow our example in acknowledging them, nothing can contribute to that end so much as the removing of any stumbling block out of the way of that acknowledgment. Any person must have attended very little to the present state of opinions in Europe who does not believe that there are Governments which might make a commercial treaty with a New State in the simplest form of words which yet would be staggered at a Preamble of formal Recognition."[2]

It has not always been easy to adhere to the policy of avoiding express recognition. The importance which a new State attached to express as distinguished from implied recognition by treaty may be seen from the report to Canning sent by the British plenipotentiaries who were instructed to negotiate a treaty with Mexico. The Mexican plenipotentiaries were reported to have expressed the view that implied recognition was "not sufficient for the people who, just emerging from a long and arduous struggle for liberty, required a clear and positive declaration to that effect". In emphatic terms they expressed preference for formal recognition "even though purchased by extensive concessions, than an acknowledgment *de facto*, however liberally offered, provided it was necessary . . . to reflect upon it in order to discover that it was really an acknowledgment at all".[1] The Mexican delegates proposed to offer special commercial privileges in exchange for express recognition.

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[1] *League of Nations, Official Journal*, 1924, p. 836. For the allegation, rejected by the court, that by entering into certain agreements with Eire scheduled to the Eire (Confirmation of Agreements) Act, 1938, Great Britain recognized the full separation of the Irish Free State from the British Empire, see *Murray* v. *Parkes* (1942), 58 *T.L.R.* 231.

[2] George Canning to Sir Charles Stuart, December 1, 1825, printed in Webster, *Britain and the Independence of Latin-America*, vol. I (1938), p. 291. However, Sir Charles was instructed to agree to express recognition in case Brazil should insist upon it.

Participation in Conferences

Participation in a conference attended by the unrecognized State or government does not amount to recognition of that State or government. Notwithstanding occasional hesitation, this is a view constantly acted upon by governments.[2] Its cogency is obvious. As a matter of principle, if the signature of or adherence to a multilateral treaty to which an unrecognized State is a party does not amount to recognition, it is difficult to see how participation in a conference, which normally leads to such treaties, can amount to recognition. As a matter of convenience, there would seem to exist the strongest objection to a rule which would make it impossible for a State to participate in a conference attended by one or more unrecognized governments or which would mar the atmosphere of the conference by precautionay declarations. Undoubtedly, official and solemn admission to an international conference may be a convenient way of granting recognition, but there must be persuasive evidence of intention to grant recognition in that way. Thus, for instance, it has been suggested that the formal admission of Poland's plenipotentiaries to the Peace Conference on January 18, 1919, amounted to recognition.[3] Actually, Poland was recognized by individual and express declarations.[4]

Accrediting and Receiving of Diplomatic Representatives

The formal appointment or reception of diplomatic representatives is properly regarded both as a mode and as an irrebuttable presumption of recognition. Persons clearly and solemnly endowed with diplomatic character represent the State in all its aspects. Diplomatic intercourse is a sign of normal relations, and the solemnity and formality with which it is inaugurated leave no doubt as to the intention of recognition pure and simple. Practice shows numerous examples of adoption of this method of recognition.[5]

[1] Mr. Morier and Mr. Ward to Mr. Canning, April 10, 1825: Webster, *op. cit.*, p. 469.

[2] In its instruction to the American Delegation sent in 1925 to the Conference on the supervision of the international trade in arms and ammunition the Department of State expressed the view in emphatic terms that the bare participation of the United States through an American Delegation in a Conference attended by the delegates of the Soviet Government, which at that time was not recognized by the United States, "would signify nothing" (Hackworth, *op. cit.*, p. 348). This was also the view of the Department on the occasion of the Bolivar Congress in 1926, at which time the Nicaraguan and Ecuadoran Governments were not recognized by the United States (*ibid.*, p. 346). In 1924, at a time when the United States did not recognize the Chilean Government, they took part in the Fourth Pan-American Congress convened at Santiago, Chile. It was not considered that such participation could properly be construed as recognition. The United States Delegation was instructed formally to make that clear in case an attempt should be made to construe the participation of the United States in that sense.

[3] See Temperley, *A History of the Peace Conference of Paris* (1920–4), vol. V, p. 158.

[4] See below, p. 132.

[5] Thus, for instance, the British recognition of Poland in 1919 was in the form of the following communication addressed by the head of the British Mission in Warsaw to the Polish Government:

On the other hand, the retention of diplomatic representatives for the purpose of communicating with a government established as the result of a revolution does not imply its recognition. In 1870 the British Government instructed the Ambassador in Paris to enter into communication with the "Gouvernement de la Défense Nationale" for the purpose of protecting British interests, but without recognizing the new Government. It had been for a long time the practice of the British Foreign Office in cases of revolutionary changes to instruct the diplomatic representatives to remain at their posts and to maintain the necessary contacts without, however, recognizing officially the new government.[1] The practice of the United States[2] and of France[3] was similar. The more recent, but not uniform, practice of Great

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British Mission, Warsaw,
26 *February* 1919.

"Sir,

"With reference to my Note of February 25th, I have been instructed to inform your Excellency that, as soon as practical arrangements are possible, His Majesty's Government will be most happy to enter into formal diplomatic relations with the Government of Poland . . ."

Previously, on February 23, 1919, the following telegram had been sent from London to Sir E. Howard, the British representative at Warsaw:

> "His Majesty's Government have decided to recognize Poland as an independent Sovereign State.
>
> "Please inform General Pilsudski of this decision and offer him the congratulations of His Majesty's Government on the occasion.
>
> "You should at the same time inform M. Paderewski that his Government are henceforth recognized by His Majesty's Government as the official Polish Government with whom they will be happy to enter into formal diplomatic relations as soon as practical arrangements permit. Mr. Balfour telegraphed to London on February 22, 1919, that it was decided at yesterday's meeting [of the Peace Conference] to recognize the Polish Government. Please take necessary action accordingly."

The following was regarded as the full recognition of the Provisional Polish Government by the United States on January 22, 1919:

> "The Pesident of the United States of America directs me to extend to you as Prime-Minister and Secretary for Foreign Affairs of the Provisional Polish Government his sincere wishes for your success in the high Office which you have assumed and his earnest hope that the Government of which you are a part will bring prosperity to the Republic of Poland.
>
> "It is my privilege to extend to you at this time my personal greetings and officially to assure you that it will be a source of gratification to enter into official relations with you at the earliest opportunity."

Telegram from the American Peace Mission in Paris to M. Paderewski: *United States Foreign Relations*, 1919 (II), p. 741.

[1] In connection with the Chilean revolution in 1891 the British Minister was instructed as follows: "You are authorized to recognize the new Government provisionally, and to enter into *unofficial relations* with it as soon as its formation has been duly announced to you." The Under-Secretary of State addressed a letter to the newly appointed Chilean Minister informing him that "according to the usage observed by this country in such cases, formal and full recognition, with the establishment of official relations, would follow as soon as a President has been constitutionally elected and installed."

When in 1889 a revolution broke out in Brazil the British Minister was instructed in the following terms: "You should for the present maintain friendly relations unofficially with the new Government, and *when it is legally established* you should refer to me for further instructions as to its official recognition by Her Majesty's Government." On October 2, he was authorized to inform the Brazilian Government that "as the recent elections for the constituent assembly showed the acquiescence of the mass of the population in the new form of government, Her Majesty's Government were ready to recognize the flag of the Republic, and that as soon as a President of the Republic had been formally and constitutionally installed Mr. Wyndham (the Minister) would be accredited to him in due form."

[2] The instructions sent in 1879 by Secretary Evans to the United States representative

Britain has been to instruct British diplomatic representatives in countries in which a revolutionary government has come to power to inform the government concerned that in the view of the British Government the change did not affect the relations between the two countries. This course was followed in 1925 with regard to Chile and Ecuador and in 1930 with regard to Peru, the Argentine and Brazil. The practice of the United States has undergone a similar change. It must be regarded, subject to the exigencies of war,[1] as indicative of the present practice of these two countries. Moreover, there is authority for the view that the sending of diplomatic representatives, unaccompanied by official and formal presentation of credentials, does not amount to an implied recognition of a government. Such persons are merely agents, the sending or reception of whom, far from amounting to recognition, is the frequent concomitant of its refusal.[2]

Appointment and Reception of Consuls

(*a*) *Appointment and Reception without Request for or Issue of Exequatur.* These do not carry any implication of recognition. This applies not only

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in Venezuela were based on the same view: "The American Minister was . . . to 'maintain' a considerate and conciliatory attitude' in his 'unofficial relations with the new government and to 'co-operate in all proper ways (short of formal recognition until so instructed)'. . . . The actual formula of recognition is unmistakable and, short of that evident step, the diplomatic fiction of 'officious' intercourse, or 'unofficial' action is elastic enough to admit of continuing ordinary intercourse" (Moore, *op. cit.*, I, pp. 150, 151). And see generally *ibid.*, pp. 235–41, on acts falling short of recognition of governments. Moore—correctly, it is believed—summarizes the existing practice as follows: ". . . the sending of a new minister or the retention of an old one, while it implies continued recognition of the State, does not constitute a recognition of the new government, so long as there is no formal presentation of credentials and communications bear only an unofficial character." (*Ibid.*, p. 235.)

In 1913 and in the subsequent years, although the United States refused to recognize the Huerta governments, they nevertheless maintained a diplomatic mission in Mexico City which transacted business with those in *de facto* control of the capital. The Notes sent by the Minister to the unrecognized authorities were marked "Personal—Unofficial", but the relations with the unrecognized government were otherwise in many ways hardly distinguishable from ordinary diplomatic intercourse. See Houghton in *Temple Law Quarterly*, V (1930–1), pp. 340–67, and *George W. Hopkins'* case decided on 31 March, 1926, by the United States-Mexican General Claims Commission (*Opinions of Commissioners*, 1929, pp. 45, 46).

On the other hand, the practice of the United States agrees with that of other states inasmuch as formal recognition of diplomatic representatives or the issue or renewal of letters of credence is held to imply recognition. Thus various French revolutionary governments were recognized by the United States through this method: in 1793 by the reception of M. Genet as Minister (Moore, *op. cit.*, I, p. 121); in 1804 by the issue of new credentials to the American Minister in Paris (*ibid.*, p. 122); in 1848 and 1852 in the same way (*ibid.*, pp. 124, 126). And see *ibid.*, pp. 139, 147, 148, 154, for other examples.

The Fifth Committee of the First Assembly of the League of Nations expressed the view, in connection with the Ukrainian demand for admission, that the appointment of representatives with a government implied recognition *de facto* of that government: *Records of the First Assembly, Plenary Meetings*, p. 666. On the other hand, the same Commission apparently held that the circumstance that a *de facto* government receives and sends unofficial agents and that it enters into negotiations with other states, does not necessarily imply its recognition *de facto* by those States: *ibid.*, pp. 669, 670. In connection with the admission of the Dominican Republic, the Sixth Committee of the Fifth Assembly answered the question whether the Dominican Republic was recognized *de jure* or *de facto* by finding that the majority of European and American States had diplomatic or consular representatives there: *5th Assembly, Records of Sixth Committee*, Special Supplement, No. 29, p. 24.

[1] See. e.g., the instructions given in 1873 to the French diplomatic representatives at Madrid: *Documents Diplomatiques Français*, I. 1, p. 201.

[2] As in the case of Bolivia in November 1943 and the Argentine in February 1944.

to the retention of consuls in countries with unrecognized governments, but also to the renewal of consular personnel and the sending of consuls, without a request for or issue of an exequatur, when none had been previously sent.[1] The function and the status of consuls thus sent and received are, in practice, indistinguishable from those furnished with an exequatur. Acquiescence in activities of consuls sent by unrecognized régimes as well as the toleration by the latter of consuls sent to them by non-recognizing States are a persistent feature of international practice.[2]

(*b*) *Request for an Exequatur.* Governmental practice seems to be divided on the question as to whether the request for an exequatur implies recognition. The United States have repeatedly requested exequatur in circumstances in which there was a clear absence of any intention to grant recognition. Moore summarizes the practice of the United States in the matter by saying that "the act of soliciting and receiving from the government of a certain country an exequatur for a consular officer at a particular place, is not a conclusive recognition of such country's sovereignty over the place in question".[3] He quotes a number of examples indicative of that view.[4]

In 1911, notwithstanding their refusal to recognize the annexation of the

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[1] In *Taylor* v. *Barclay* (1828), 2 Sim. 214, it was contended on the part of the plaintiff that the appointment of consuls to the Latin-American countries as well as a meeting between the officers of the King and officials of Guatemala at a Congress at Panama implied the recognition of Panama. The Foreign Office, fortified by an Opinion of the Law Officers, gave a negative reply to the question whether recognition had been granted. See Bushe-Fox in *British Year Book of International Law*, 12 (1931), pp. 71, 72. The British, and some American, practice on the subject are surveyed in a memorandum prepared in 1873 by Mr. Hertslet, Librarian of the Foreign Office, and printed in Smith, *Great Britain and the Law of Nations*, vol. I (1932), pp. 251–7. For the more recent practice of the United States see Moore, *op. cit.*, vol. I, § 72, and vol. V, § 698; Hackworth, *op. cit.*, vol. IV, pp. 688 *et seq.* See also *Harvard Research in International Law*: *Consuls* (1932), Article 6, pp. 238–41. And see Bonham, *The British Consuls in the Confederacy* (1911), and Moore, *op. cit.*, I, p. 207, on the maintenance, for a time, by Great Britain of consuls in the Confederacy notwithstanding the absence of recognition.

[2] The Advisory Committee of the Assembly of the League set up in connection with the non-recognition of Manchukuo did not consider the replacing of consuls to imply the recognition of Manchukuo. The reason adduced was that those agents were appointed for the purpose of keeping their governments informed and of protecting their nationals: *Official Journal of the League of Nations*, Special Supplement, No. 113, p. 13. But the Committee thought it to be in conformity with the recommendation of the Assembly that the consuls, in their contact with the Manchukuo authorities, should not, so far as possible, do anything which might be interpreted "expressly or by implication" that they regarded the authorities established in Manchuria as being the proper government of the country. For numerous examples of continuation of consular activities notwithstanding the absence of recognition see Hackworth, *op. cit.*, vol. IV, pp. 684–699. In the course of the Spanish Civil War between 1936 and 1938, while the United States declined to recognize passports issued by agents of General Franco, whose Government they did not recognize, it was pointed out to General Franco's representative that in practice persons bearing such documents were granted visas without being required to present any other papers. See for the Instructions of the Department of State on the matter in May 1938, Hackworth, *op. cit.*, vol. IV, p. 698. Similarly, no restrictions were imposed on the issue of necessary papers by Franco agents to enable vessels to proceed to ports in Spain under their control. In 1926 no objection was raised to the payment of fees to the agent of the unrecognized Nicaraguan Government for ships clearing to ports under its control (*ibid.*, p. 695). In 1922, at a time when the United States refused to recognize the government in power in Guatemala, the United States authorities transacted business with a person appointed as Consul-General of Guatemala in New York, but the United States Chargé d'Affaires in Guatemala was instructed to make it clear to the authorities concerned that "such action does not constitute recognition but is taken simply to avoid inconvenience and loss to commercial interests". *United States Foreign Relations*, 1922 (II), p. 459.

[3] *Op. cit.*, vol. V, p. 13.

[4] Such as the obtaining exequaturs from Nicaragua for a consul at Corn Island; from the Hovas Government for a consul at Madagascar; and from Great Britain for a consul at Belize.

Congo by Belgium, the United States applied for and received from the Belgian Foreign Office the recognition of an American "Vice and Deputy Consul General" in the Congo. In its instructions to the American Minister the Department of State said: "In instructing you to apply to the Belgian Foreign Office for the recognition of Mr. Broy the Department was simply carrying out the rule and custom of asking consular recognition by the *de facto* authorities, it not being a question of *de jure* determination."[1] When in 1924 the United States refused to recognize the Chilean Government, they agreed to accept exequaturs issued by the Chilean Government provided it were understood that such acceptance did not involve recognition. The Department of State was apparently of the view that formal and unconditional acceptance of exequatur would have the effect of recognition,[2] a view not necessarily based on former practice.

After the purported assumption by Germany of a protectorate over Czechoslovakia in 1939, Germany, possibly in order to obtain recognition by the backdoor of implied recognition resulting from an application for consular exequatur, informed various governments that consulates in Prague required an exequatur from Germany and that they would have to discontinue their consular functions unless an exequatur was applied for within six weeks. The United States thereupon applied for an exequatur, but the Embassy in Berlin was instructed to inform the German Foreign Office orally that this step would not involve a change in the attitude of the United States as to the status of Czechoslovakia. Thereupon the German Government refused to comply with the application on the ground that "when one government addresses to another government a request that such an exequatur be granted, it must recognize that the other government is entitled to sovereignty over the area in question" and that "it is an evident self-contradiction to ask a government to perform an act in the exercise of its sovereignty and at the same time to contest the right of that government to exercise such sovereignty".[3] The United States maintained its attitude, but the consulate was not closed.

On the other hand, some British official pronouncements seem to indicate that a request for an exequatur is tantamount to recognition. In the course of the Mosul Boundary Dispute between Great Britain and Turkey, in reply to the Turkish contention that she had declined to recognize the mandatory system, the British representative on the Council of the League submitted that by applying for and succeeding in obtaining exequaturs for Turkish consuls at Beirut, Aleppo, and Jerusalem, Turkey had recognized these mandates.[4] In 1931 the British representative before the Mandates Commission stated that "foreign states had been informed that their request for King Faisal's exequatur would imply *de jure* recognition".[5] In 1937, in connection with the Spanish Civil War, the language used was less emphatic. When explaining on November 8, 1937, the reasons for the mutual appointment of agents by Great Britain and the insurgent authorities in Spain, the Foreign Secretary pointed out that while it would have been possible to meet the existing difficulties by the transfer of consular offices to insurgent territory, that course was not adopted because "the appointment of new Consuls with commissions from His Majesty the King and the grant to them of an exequatur by the authorities at Salamanca would have implied a measure of recognition of these authorities".[1]

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[1] Hackworth, *op. cit.*, vol. IV, p. 684.
[2] *Ibid.*, p. 688.
[3] *Ibid.*, p. 689.
[4] *Official Journal*, 1925, p. 1334.
[5] Permanent Mandates Commission, *Minutes*, XX, p. 133.

There is no compelling reason of logic why a request for a consular exequatur should signify general recognition, i.e. an admission other than that the requested authority is in power in the territory in question and that it is in a position to ensure the conditions necessary for the normal performance of consular functions. If, for the sake of prestige or for other reasons, that authority attaches importance to the formal request for an exequatur, the non-recognizing State may comply with that wish without committing itself to the wider consequences of general recognition. The importance and the character of the exequatur and of the consular function in general would not seem to make it a proper or natural instrument of recognition. However, in view of the preponderance of opinion that a request for an exequatur implies recognition, a Government making that request and wishing to avoid any such implication will be acting wisely in entering a caveat calculated to prevent that effect.

(*c*) *The Issue of an Exequatur.* The same considerations would seem to apply to the question whether the issuing of an exequatur to the consuls of a hitherto unrecognized State or government amounts to recognition. However, such scant practice and expression of opinion as exist in the matter clearly favour the implication of recognition.[2]

The Appointment of Agents

The appointment of agents or missions not endowed with diplomatic character does not constitute recognition. On the contrary, the very reason for their appointment is the unwillingness or the inability to grant recognition and to maintain ordinary diplomatic relations. In 1919 Great Britain sent agents to and received agents from the Provisional Government of Northern Russia with which she and the Allied Powers were co-operating. But the Foreign Office, in reply to an enquiry from the court, stated that that Government "has not been formally recognized either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent State". The court thereupon decided that the Government in question was not entitled to the ordinary jurisdictional immunities enjoyed by governments of independent states.[3] In the course of the discussion arising out of the *Trent* case—in which two political agents sent to Great Britain and France in 1861 by the Confederate States were forcibly removed from a British ship by a Federal cruiser—Great Britain based her case largely on the right of receiving agents from the Confederacy.

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[1] House of Commons, *Debates*, 1937–8, vol. 328, col. 1386.

[2] That the grant of an exequatur implies recognition was apparently the view of the United States in 1819 when they refused the request of the United Provinces of South America for the grant of an exequatur to their consul: ". . . the exequatur for a consul can obviously not be granted without recognizing the authority from whom his appointment proceeds as sovereign": Moore, *op. cit.*, I, p. 79. While Manchukuo granted exequaturs to consuls sent by Russia, it was reported that the latter permitted Manchukuan consuls to function within her territories: *Manchukuo Year Book*, 1934, p. 154. The distinction is significant.

[3] *The Annette; The Dora* [1919], P. 105.

The latter, although recognized as belligerents, had not received recognition as a government either *de facto* or *de jure*. In reply to the remonstrances of the United States Earl Russell insisted on the right of neural states to receive from unrecognized governments special agents, enjoying no representative character and no diplomatic honours, but otherwise entitled to the "immunities of ministers". In another Note he emphatically asserted the right to enter into communication with a *de facto* government in order to provide for the temporary security of the persons and property of British subjects, but he was careful to add that "such communications will not imply any acknowledgement of the Confederacy as an independent state".[1] The United States, it is true, did not agree with that view, but their past—and subsequent—record in this matter fully supported the British contention. Already in 1792 Jefferson, writing as Secretary of State to the American Minister in Paris, pointed out that with a mere *de facto* government which could not yet be recognized by the United States because, apparently, it was not "formed by the will of the nation, substantially declared", some kind of business could be transacted without implying recognition, such as "reforming the unfriendly restrictions on our commerce and navigation".[2] In 1810, long before they recognized the independence or belligerency of the rebellious South American provinces, the United States sent an agent to Buenos Ayres charged with the mission "to explain the mutual advantages of commerce with the United States, to promote liberal and *stable* regulations, and to transmit seasonable information on the subject". He was furnished with a "credential letter".[3] In 1849 the United States sent a special agent to Hungary, which had risen in revolt against Austria, for the purpose, among others, of communicating with the rebel authorities.[4] Secretary Seward himself—who protested vigorously against the reception by Great Britain of the agents of the Confederacy—insisted in his instructions of March 9, 1863, to the United States representative in Venezuela, that the United States had "under the law of nations and by treaty, a clear right to have its properly appointed agents residing in Venezuela, . . . without a previous recognition of the existing authorities, . . ."[5] In their relations with the numerous unrecognized governments in Latin America the United States have widely followed the practice of appointing agents, commercial and other.[6]

When, following upon the Venizelos revolution in December 1916, the Greek Minister in London and the Greek Consul-General in London sent their resignations to the Athens Government, they were after a short delay recognized, respectively, as representative in London of the Provisional (Venizelos) Government and as Consul-General of that government. But the former did not apply for recognition as envoy extraordinary and minister plenipotentiary, and was recognized only as "the diplomatic agent in

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[1] United States, *Diplomatic Correspondence*, 1862, pp. 8, 9.

[2] Moore, *op. cit.*, I, p. 120.

[3] Moore, *op. cit.*, I, pp. 214, 215.

[4] *Ibid.*, pp. 220–4.

[5] *Ibid.*, pp. 235, 236.

[6] See Houghton in *Temple Law Quarterly*, V (1930–1), pp. 349–67, on the practice of the United States with regard to communication with unrecognized governments. And see in particular Wriston, *Executive Agents in American Foreign Relations* (1929).

London of the provisional government at Salonica". He did not present letters of credence to the King. No exequaturs were issued to the consular officers serving under him.

In the course of the Spanish Civil War the Foreign Secretary announced in the House of Commons on November 8, 1937, that in order to protect British commercial, industrial and financial interests in the part of Spain under the control of the insurgents it was decided to appoint an agent charged with the protection of those interests throughout the area as well as a number of sub-agents stationed at a limited number of places. The appointment of the agent and sub-agents was to be reciprocal. He stated that "the reception of such an agent in London will not in any way constitute recognition by His Majesty's Government of the authorities of the territories under the control of General Franco", and that "neither party will accord or expect to receive diplomatic status for their agents".[1] It was mutually agreed that the agents and sub-agents should exercise, in the same way as consular representatives, all the normal functions of consuls in relation to matters of commerce and navigation. Subsequent to the appointment of the British and the Spanish agents, the Government informed the House of Commons on April 4, 1938, that as it was "felt desirable to secure for the British Agent and his staff certain privileges of a kind which are commonly enjoyed by diplomatic officials in order to facilitate the discharge of their duties", "it was found necessary to concede corresponding privileges . . . to General Franco's Agent and his staff".[2] But the Government made it clear that such concessions involved no admission that the recipients possessed diplomatic status and that the designation, used in a Foreign Office communication, "Spanish Nationalist Government" did not involve recognition of General Franco's administration.[3]

Fact and Mode of Address

Once we are determined to view recognition as a deliberate and formal act referring comprehensively to international personality or governmental or belligerent capacity as a whole, it is not difficult to avoid the mistake of attributing the effect of recognition to various kinds of address and contact or communication with the foreign authority. It has been shown that no such automatic effect can be attributed to the conclusion of multilateral treaties, to the retention of diplomatic representatives, and to the appointment of consuls and agents. But there has been a pronounced tendency to imply recognition or to anticipate the dangers of such implication, and international practice abounds in examples of precautions—on occasions ingenuous to the point of being diverting—taken by governments in order to prevent any such interpretation of their actions.[4] Governments emphasize repeatedly that recognition is a question of intention, not of inference. At the same time they exhort their representatives to exhibit meticulous caution lest their action be construed as implied recognition.[1]

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[1] *Hansard*, House of Commons, *Debates*, 1937–8, vol. 328, col. 1386. The Foreign Secretary was emphatic that the exchange of agents did "not constitute recognition, official or unofficial . . . no recognition whatever": *ibid.*, col. 1510. Previously, the Prime Minister, in answer to a question whether the appointment of the agents would not in effect mean a *de facto* recognition of the insurgent government, stated that he was advised that the appointment could not make any difference in the existing situation: November 4, 1937: *ibid.*, col. 1126. And see *ibid.*, vol. 329, col. 834, for a similar statement by the Foreign Secretary.

[2] *Ibid.*, vol. 334, col. 4.

[3] *Ibid.*

[4] For a collection of some interesting examples see Hackworth, *op. cit.*, vol. I, pp. 343 *et seq.* The following other examples taken from the recent practice of the United States may be

Similarly, it may seem pedantic to attach the consequences of recognition to a mere mode of address. Yet this has been done on occasions. Thus it is often thought that to address the head of a State by the title through which he claims sovereignty over territory is necessarily tantamount to a recognition of the title thus claimed. In the years 1937 and 1938 a number of states found it incumbent upon them to refrain from entertaining diplomatic relations with Italy on the ground that to accredit an envoy to "the King of Italy and Emperor of Abyssinia" would be tantamount to recognizing *de jure* the conquest of Abyssinia. The implication was not unavoidable. There would have been no inconsistency in holding that the title of the King of Italy was primarily a matter of Italian municipal law, and that so long as there was no clear expression of intention to depart from the attitude of non-recognition, the accrediting of diplomatic representatives to the King of Italy and Emperor of Abyssinia was merely a recgonition of a *de facto* situation under both Italian municipal law and international law. This was, in fact, the attitude taken by some States.[2]

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mentioned as an illustration: On November 20, 1920, the United States Chargé d'Affaires in Mexico was advised "that although you are not authorized to be present officially at Obregon inauguration, you will be pleased to attend in private capacity": *United States Foreign Relations*, 1920 (III), p. 197.

When the King of Greece, who at that time was not recognized by the United States, sent a telegram to the President of the United States informing him of the death of his father, no reply was sent by the President but the United States Chargé d'Affaires at Athens was directed "to say informally to the Minister for Foreign Affairs that the President has received a telegraphic communication from the King announcing the death of his father, and to express suitably, under the circumstances, the condolences of the President": *ibid.*, 1922 (II), p. 414.

On February 29, 1912, the House of Representatives and the Senate of the United States adopted a Joint Resolution congratulating the people of China on the assumption of responsibilities of self-government. While publicity was given to that Resolution, the United States Minister in China was instructed to take care that this action should "not be confused with recognition, which is a prerogative of the Executive and as to which it is the present intention of the President and the Department to proceed in harmony with the other Powers": *ibid.*, 1912, p. 71. When on April 4, 1912, the American Minister in China was asked by the Minister for Foreign Affairs to visa certain certificates issued by the Provisional Government, he inquired from the home authorities whether such action would involve recognition of the administration. The answer was in the negative. Such action, he was told, "would be in harmony with our *de facto* relations with the present administration ": *ibid.*, 1912, p. 77.

When in March 1922 Great Britain terminated the Protectorate over Egypt and declared her independence, the diplomatic agents in Egypt were officially notified that all matters affecting their respective States should henceforth be taken up with the Egyptian Minister of Foreign Affairs. In reply to the inquiry by the United States Agent and Consul-General at Cairo whether communications addressed to the Foreign Minister would be regarded as recognition of the independence of Egypt, the Secretary of State issued an instruction to the effect that such intercourse as was essential should be informal so as to avoid the giving of the impression of recognition: *ibid.*, 1922 (II), p. 104.

[1] The United States Secretary of State wrote to the Chargé d'Affaires in Mexico on May 25, 1920: "You should . . . be cautious in any necessary dealings with the parties now in possession, not to permit any imputation that the present régime has been even *de facto* recognized by the Government of the United States. Recognition cannot be accomplished by inference merely but by the full and formal entrance into international relations through the public action of the respective executives of the two countries": *United States Foreign Relations*, 1920 (III), p. 167.

[2] See, e.g., the announcement made by the Irish Free State on December 14, 1937, that an Irish diplomatic representative would be accredited to the King-Emperor. See *The Irish Press* of December 15, 1937, for Mr. De Valera's statement.

Neither does the conclusion of a treaty in which the head of the State is described in a specific manner necessarily signify the recognition of the title thus claimed. When on May 8, 1937, the Montreux Convention concerning the abolition of the capitulations in Egypt was signed by the Italian delegates in the name of "His Majesty the King of Italy, Emperor of Ethiopia", the general view was that the signature of the treaty by other delegates did not in any way involve the recognition of any Italian title over Ethiopia since the responsibility for the description of its "Head of State" in the preamble of the Convention rested with the Italian delegation.[1] A less technical reason would have been equally persuasive.

It has been noted above that, whenever they deem it necessary, governments do not decline to have communications with those whom they refuse to recognize. Neither, as a rule, are such attempts at communication rejected by the unrecognized authority. The latter is, of course, under no obligation to listen to a communication emanating from that source. On December 2, 1929, the Government of the United States, which at that time refused to recognize the Government of Soviet Russia, addressed identical notes to the latter and China reminding them, in view of the conflict in which they were engaged at that time, of their obligations under the General Treaty for the Renunciation of War. The Soviet Government in its reply expressed astonishment that the Government of the United States, which refused to entertain normal relations with it, found it possible to address to it its views and advice.[2] No such objection was raised when, on 16 May 1933, the President of the United States addressed the Soviet Government, alongside of other fifty-three governments, in connection with the Disarmament Conference.

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[1] For the statement of this principle by M. Politis, President of the General Committee of the Conference, see *Actes de la Conférence des Capitulations*, pp. 129, 137.

An incident in a lighter vein arising out of the refusal of most members of the League of Nations to recognize the Italian conquest of Abyssinia may be mentioned. At a State banquet held in November 1936 in Vienna, the Austrian Chancellor, apparently without having given due notice to those likely to be interested, gave the toast of "the King of Italy and Emperor of Ethiopia". It was subsequently reported that, by a convenient coincidence, the glasses of the British and French ministers happened to be empty at the crucial moment so that the drinking of the toast of "Emperor of Abyssinia" proved, so far as they were concerned, a physical impossibility. See *The Times* newspaper, November 12 and 13, 1936.

It was reported in the *New York Times* of September 17, 1941, that when the President of the United States accepted from the High Commissioner of French Equatorial Africa the gift of a gorilla, "the largest and most ferocious" ever sent out of Africa, the question was raised whether the acceptance of the gift signified an implied recognition of the Free French movement.

In 1861 Prussia had not recognized the Kingdom of Italy. Italy being desirous of sending an ambassador to attend the coronation of King William I of Prussia, General de la Rocca was appointed ambassador of King Victor Emmanuel, without reference to the country of which he was king : Satow, *A Guide to Diplomatic Practice* (3rd ed. by Ritchie, 1932), p. 113.

When in November 1943 the Spanish Foreign Minister sent a message of congratulation to one Laurel, appointed President of the Philippines by the Japanese authorities then in occupation of that territory, the United States were inclined to take a serious view of what on the face of it appeared as recognition of the independence of the Philippines. Subsequently the United States accepted the explanation of the incident as being no more than a message of sympathy for the Philippine people at large.

[2] In an interview to the Press, the President is reported to have declared: "As at previous world gatherings the American delegates will have the ordinary relations and communications with the Russian delegates which they maintain with delegates from other countries." (As reported in Jaffe, *Judicial Aspects of Foreign Relations* (1933), p. 118.)

Documents on International Affairs, 1929, pp. 277 and 280. The Polish-Lithuanian dispute concerning Vilna was throughout rendered more intractable as the result of the Lithuanian view, frequently expressed, that the re-establishment of communications between the two states would imply recognition of the sovereignty of Poland over the disputed territory. See *League of Nations: Official Journal*, 1928, p. 1478; 1929, p. 144; 1931, p. 480. The same consideration played a part in the controversy concerning Memel: *ibid.*, 1924, pp. 131, 143.

It is clear that intervention with the unrecognized authority, like lodging of protests and other measures of protection of nationals, does not in any way imply recognition. The very reason for the retention of diplomatic and consular representatives in countries with unrecognized régimes as well as the sending of agents to them, is to protect nationals. The practice of States abounds in instances of express insistence on the right to protect the interests of nationals within the territory of unrecognized régimes without any implication of recognition.[1] This applies in particular to unrecognized governments. The duty to treat aliens in accordance with international law is a duty of the State irrespective as to who holds power at any given moment.[2]

The ingenuity of special pleading intent upon implying recognition is shown by the argument put forward in *The Annette*,[3] a case in which the so-called Provisional Government of Northern Russia claimed that, being a recognized government, it was entitled to jurisdictional immunities. The court had before it a statement of the Foreign Office informing it that the Provisional Government "has not been formally recognized by His Majesty's Government". The court was asked to infer from that statement that the Provisional Government had been "informally recognized". This the court was not prepared to do.

Finally, reference may be made to the assertion that surrender of criminals or request for their surrender implies extradition.[4] Neither principle[5] nor practice[6] substantiates that view. If, as has been shown, a certain amount of contact is not inconsistent with non-recognition, it is difficult to see how contact in a matter as elementary as suppression of crime could have the effect of bringing about recognition.

Implied Recognition and the Policy or Obligation of Non-Recognition

Some of the questions discussed above show the connection between the doctrine of implied recognition and the principle of non-recognition as enunciatedin 1932 by the United States and the Council of the League of Nations subsequent to the invasion of Manchuria.[1] That principle pursues two independent objects. The first is to preserve the existing legal position and to prevent the operation of prescription. The second is to express moral disapproval manifested in the continued denial of legal title regardless of the apparent success achieved by the conduct, stigmatized as unlawful, as well as to exercise pressure upon the wrongdoer in consequence of such disadvantages as normally follow from the absence of recognition. That second purpose may, without affecting the first, be modified in practice having regard to the necessities of commercial and other intercourse. Such modifications may materially impair the effectiveness of the weapon of non-recognition as an instrument of direct pressure, but its indirect value in the system of international jurisprudence and morality may still remain substantial and beneficent. This is one of the reasons why the exaggerations of the doctrine of implied recognition must be carefully scrutinized in relation to the principle of non-recognition. If we fall a prey to the tendency to interpret various kinds of conduct as implied recognition, we may often be led to assume, without good cause, that the principle of non-recognition has been abandoned in a particular case. Conversely, if the doctrine of implied recognition is confined within its proper sphere, States may be in a position, without necessarily becoming disloyal to the general obligation of non-recognition, to adapt their conduct to the requirements of international intercourse and to the protection of their interests and those of their nationals.

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[1] See Hackworth, *op. cit.*, vol. I, pp. 360–3, for instances of communications to Mexican insurgents in 1912 and to Spanish insurgents in 1936. Professor Podesta Costa, in a careful study of the subject, rejects the implication of recognition said to result from various forms of "relations officieuses". He says, in particular: "Les démarches officieuses effectuées par l'intermédiaire des représentants diplomatiques qui étaient accredités devant le gouvernement deposé, ou par des envoyés devant le nouveau gouvernement, ou par des agents spéciaux reçus de lui ne signifient par la reconnaissance du gouvernement *de facto*, même si elles sont répétées au point de prendre l'aspect de relations continues" (*Revue générale de droit international public*, 29 (1922), p. 458). See also above, p. .

[2] But even in this respect the doctrine of implied recognition dies hard. Thus when in March 1944 the United States refused to recognize General Farrell's Government in Argentina, it was reported that this was the reason why the United States were unable to take action in respect of restrictions imposed by that Government upon the citizens of the United States (see *The Times* newspaper, March 20, 1944).

[3] *The Annette; The Dora* [1919] P. 105.

[4] See, e.g., Holtzendorff, *Handbuch*, I, § 8.

[5] See Hall, *International Law* (4th ed., 1895), p. 93, who points out that it is not clear "why the surrender of an ordinary criminal to a *de facto* Government, in the possession of regular courts, need more necessarily constitute recognition than does recognition of belligerency".

[6] See Memorandum of July 22, 1920, by the Solicitor for the Department of State: "It is established by sound authority that, in international practice, the surrender of criminals to *de facto* authorities does not indicate expressly or by implication political recognition. The recovery of fugitive criminals merely affects the practical course of the administration of justice." Hackworth, *op. cit.*, vol. IV, p. 37.

Any general attitude of non-recognition, i.e. the proclaimed assumption of the policy or obligation of non-recognition, has a direct bearing on the operation of the doctrine of implied recognition. It reduces the operation of that doctrine even below the modest limits which can otherwise be assigned to it. This means that particularly exacting evidence of recognition is required in the case of States which have declared themselves to be pursuing a policy of non-recognition or, even more so, as being bound by an obligation of non-recognition. There is room for the view that in such circumstances nothing short of an explicit and unequivocal act of recognition will have the result of recognition. Whatever other effects the doctrine of non-recognition may have, this much may be expected of it that it has at least the effect of ruling out implied recognition. In the circumstances, any caveat which might otherwise be necessary is redundant.

These incidental results of the proclaimed attitude of non-recognition have not always been appreciated, as may be seen from some of the ingenious precautions recommended by the Advisory Committee of the Assembly of the League of Nations set up in connection with the non-recognition of Manchukuo. In January 1934 the General Post Office in London received from "The Department of Communications of Manchukuo" a request to be furnished with statistics in accordance with the provisions of the Postal Union Convention with a view to the liquidation of the transit payments due in respect of mails sent through Manchuria. The British Government thereupon requested the Secretary-General of the League of Nations to put the matter before the relevant Sub-Committee in order to obtain a ruling as to the extent to which *de facto* relations may be permitted between foreign postal administrations and the Manchurian postal authorities, without involving, by implication or otherwise, recognition of the existing régime in Manchuria.[1] The inquiry was answered in May 1934 with an elaboration of detail showing both the attraction of the doctrine of implied recognition and the meticulous care taken to meet its dangers in circumstances in which reliance upon the general attitude of non-recognition would have been sufficient. While the Committee considered that administrative postal relations with the Manchukuo authorities were permissible, it added: "Lest these technical relations lead to confusion, it is recommended that, should the postal administrations of States Members of the League address correspondence to the postal administration of 'Manchukuo', such communications should contain once for all an explicit statement that they are only to be regarded as communications between one administration and another, for the sole purpose of ensuring the proper conduct of technical services, and not as communications between one Government and another, and that they do not imply that the Universal Postal Convention is applicable."[2] It would have been open to the Advisory Committee to state that as recognition was a matter of intention and that as Members of the League had clearly manifested their determination to refuse recognition to Manchukuo, the British, and any other, postal administration may properly maintain with the postal authorities of Manchukuo such relations as may be deemed indispensably necessary for the matter covered by the inquiry and that no such action could accurately be construed as recognition.[3]

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[1] The subject is here discussed in some detail irrespective of the future development of the doctrine of non-recognition. As to the latter, see Lauterpacht in *Legal Problems in the Far Eastern Conflict* (ed. by Wright, 1941), pp. 129–56. See also Borchard and Morrison, *ibid.*, pp. 157–78. Such usefulness as that doctrine may possess as an international sanction is of an auxiliary and secondary nature. Within that orbit it raises questions of both practical and theoretical importance in relation to the doctrine of implied recognition.

The ingenuity with which the Advisory Committee of the Assembly approached other situations in this connection is instructive. The Committe was emphatic that the non-recognizing governments could not regard as a passport a document issued by authorities dependent upon the "Manchukuo Government" and could not therefore allow their consuls to visa such documents. But the Committee saw no reason why an inhabitant of Manchukuo desirous of leaving the country should not be able to receive an identity document from the consul of the country which he wished to visit, nor why, in issuing that document, the consul should not, for the purpose of establishing the identity of the person in question, utilize documents issued by the Manchukuo authorities and called by them passports, *laisser passer*, etc.[1]

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[1] *League of Nations, Official Journal*, 1934, p. 429.

[2] *Ibid.*, p. 430.

[3] In the same month the Chinese Government suggested in an elaborate memorandum that the export of opium or other dangerous drugs to Manchukuo be stopped and be replaced by a modified system of control by import certificates issued by consular representatives in Manchuria. One of the reasons for the proposal was "the added advantage of being free from any implication prejudicial to the principle of non-recognition of the present régime in Manchuria" (*League of Nations, Official Journal*, 1934, p. 432). This proposal was put forward notwithstanding the fact that the Advisory Committee had previously made an elaborate recommendation calculated to rule out any implication of recognition. It had recommended, on June 7, 1933, that while a copy of the export authorization should accompany any consignments sent to Manchukuo for purposes not contrary to the Opium Convention, "Governments should refrain from forwarding a second copy of the export authorization to 'Manchukuo', since such action might be interpreted as a *de facto* recognition of 'Manchukuo' " (*ibid.*, Special Supplement, No. 113, p. 12).

The question of the recognition by the United States of the annexation of Austria by Germany in 1938 supplies another instructive illustration of the subject under discussion. As mentioned, the United States announced in 1932 its policy of non-recognition, *inter alia*, of territorial arrangements accomplished by force. Great Britain, alongside of other members of the League, declared herself in March 1932 to be bound by a similar and, having regard to the provisions of the Covenant, wider obligation. In March 1938 Germany accomplished what was in fact a forcible annexation of Austria. On March 19, 1938, the United States Secretary of State, after having previously denounced the German action as being one of forcible intervention in violation of treaty obligations, issued a statement accepting as a "fact" the disappearance of Austria as an independent State. On April 6 the United States Ambassador in Berlin informed the German Government that, in view of the notification received from the Austrian Minister at Washington that Austria "had ceased to exist as an independent nation and had been incorporated in the German Reich", it was "under the necessity for all practical purposes of accepting what he says as a fact". The Government of the United States also informed Germany that it "finds itself under the necessity as a practical measure" of closing its legation at Vienna and of establishing a consulate-general in its place.[2] Did these statements and actions amount to a recognition of the annexation of Austria? Such is the fascination of the doctrine of implied recognition that even writers who were critical of the action taken interpreted it as constituting both *de facto* and *de jure* recognition.[3] One court in the United States went to the length of stating that "this change has occurred in a manner acceptable to our notions of international law" and that "the Anschluss has in no wise been disavowed by the Department of State".[4] But this has not been the attitude of other courts.[5] The view of the State Department as to the legal significance of its action was made known on a much later occasion, namely, on July 29, 1942. The Secretary of State referred to the prevalent confusion as to the status of Austria and said: "It is probable that such confusion, if it exists, has arisen from administrative steps which may have been taken by this Government in pursuance of its own laws designed to afford adequate protection to this country's interests in dealing with the situation presented by the imposition of military control over Austria, and residents of Austria, by Germany. This Government very clearly made known its opinion as to the manner in which the seizure of Austria took place and on the relation of that seizure to this Government's well-known policy toward the taking of territory by force. This Government has never taken the position that Austria was legally absorbed into the German Reich."[1]

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[1] *Ibid.*, p. 13.

[2] *Documents on International Affairs*, 1938, vol. II, p. 96.

[3] See Garner in *American Journal of International Law*, 32 (1938), p. 423.

[4] *Land Oberoesterreich* v. *Gude* (1940), 109 F. (2d) 635; *Annual Digest*, 1938–1940, Case No. 34 (a case involving the question whether the Province of Upper Austria had capacity to sue).

[5] See *Johnson* v. *Briggs* (1939), 12 N.Y.S. (2d) 60: *Annual Digest*, 1938–40, Case No. 33. In *U.S. ex rel. Zdunic* v. *Uhl* (1942), 46 F. Supp. 688; 47 F. Supp. 520, the court found it unnecessary to decide whether after April 1938 Austria was *de jure* or *de facto* a German State so far as the United States was concerned: "Our nation had taken cognizance of that fact, at least *de facto*, so that its affairs and its [*sic*] affairs of its nationals might not be prejudiced, and under necessity, as a practical measure, had closed its Legation at Vienna, established a Consulate General, and had requested of Germany approval of a provisional consular status."

It is clear that quite apart from any subsequent explanatory declaration of the State Department, the action of the United States in 1938 could not accurately be interpreted in any sense as recognition *de jure* of the annexation of Austria. Probably it could not properly be interpreted as recognition *de facto* for purposes other than the recognition of the validity in Austria of the acts of the authority in power and for all purposes necessary to protect the interests of the United States and its nationals. It consisted of measures described at the time as dictated by the practical exigencies of the moment and limited in their scope. It could not properly be given the wider effects normally associated with recognition *de jure* or *de facto*. Caution in implying recognition is a sound maxim. Double caution is imperative in relation to actions which must be viewed against the general background of a policy or obligation of non-recognition.

Admission to the League of Nations and Implied Recognition

The question of the effect, in the matter of recognition, of the admission to the League of a State which is not recognized or whose Government is not recognized by some members of the League furnishes another example of the problem of implied recognition. It is a question which must confront any international political organization of States whose membership is not compulsory for all States and in which States obtain membership by way of an express act of admission. Those who consider admission tantamount to recognition by all members of the League hold that any other result would be unsound having regard to the obligation of guarantee of Article X of the Covenant,[2] or the duty of members of the League to maintain close relations with one another,[3] or to the general legal principle that admission to partnership of a new member, decided upon by the majority, binds the dissenting minority.[4] Actual practice has not substantiated these postulated implications of admission. On a number of occasions members of the League, like Switzerland

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[1] As quoted in *U.S. ex rel. Zdunic* v. *Uhl.*, *supra*.

The Note addressed by the United States on April 6, 1938, to Germany on the subject of Austrian loans began as follows: "In view of the announcement made to the Government of the United States by the Austrian Minister on March 17, 1938, my Government is under the necessity for all practical purposes of accepting what he says as a fact and accordingly consideration is being given to the adjustments in its own practices and procedure in various regards which will be necessitated by the change of status of Austria": *Documents on International Affairs*, 1938, vol. II, p. 98.

[2] Thus the Commercial Tribunal of Luxemburg in a judgment given on March 2, 1935, held that for that particular reason the admission of Soviet Russia into the League implied the recognition by Luxemburg of the Government of that country: *Union of Soviet Socialist Republics* v. *Luxemburg and Saar Company*, *Annual Digest*, 1935–7, Case No. 33; *Sirey*, IV (1936), p. 26. See also Scelle in *Revue générale de droit international public*, XXVII (1921), pp. 122–38; Fauchille, *Traité de droit international*, vol. I (1922), pp. 334, 335; Anzilotti, *Corso di diritto internazionale* (3rd ed., 1928), p. 172.

[3] Schücking-Wehberg, *Die Satzung des Völkerbundes* (2nd ed., 1924), p. 268; Verdross, *Strupp's Wörterbuch*, vol. I, pp. 51, 52 (who for this reason limit that effect of admission to the period of mutual membership in the League).

[4] McNair in Oppenheim's *International Law*, 4th ed., vol. I (1928), § 72, n. 3. See also *ibid.* and Scalfati, *op. cit.*, pp. 278–82, for a detailed bibliography.

and Belgium in the case of Soviet Russia,[1] expressly asserted the right to continue their refusal of recognition. Their right to do so was not challenged by other members of the League. Neither are there decisive reasons of principle compelling us to maintain that by signing the Covenant, as at present formulated, a State deprives itself of freedom of action in the matter of recognition. Membership of the League undoubtedly presupposes a certain measure of intercourse, but such intercourse need not be either direct or general. There have been numerous cases of members of the League severing diplomatic relations with one another.[2] Such contact as is necessary need not include all the implications of recognition.

Undoubtedly, membership of the League, combined with the continued refusal to recognize an admitted member, is in the nature of an anomaly. However, it is not an anomaly that can be removed by the enlargement of the obligations of the Covenant through the importation of the doctrine of implied recognition. There may be some justification for such an assumption in the case of members of the League who voted for admission; *they* may find it difficult to continue in their refusal to grant recognition after having voted for admission. But even they may legitimately resist the attempt to establish an irrefutable presumption in the matter. They may point out that full statehood, such as would make recognition an obvious duty, is not predicated by Article I, paragraph 2, of the Covenant; and they may argue that they deem membership of the State in question desirable and possible notwithstanding the absence of the normal relationship following upon recognition.[3] The argument may not be entirely convincing, but so long as the States in question declare their position clearly in advance, they are in strict law entitled to disregard any consequences of implied recognition. The real difficulty with which States adopting that position have to contend is that the vote—especially their own vote—in favour of admission is strong evidence that the government of the State admitted possesses such qualifications of independence and stability as in international law entitle it to recognition. For this reason the desirable course in the future would be not easy reliance upon the doctrine of implied recognition, but the express adoption of a rule laying down that admission by a requisite majority of the members of the international organization is sufficient proof of the existence of the requirements of statehood and of governmental capacity and as such authoritatively involves the obligation of and the right to recognition. This in itself would constitute a weighty step in the direction of the rational solution of the problem of recognition, namely, its collectivization by joint action of the organized international community.

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[1] See Makarov in *Zeitschrift für öffentliches Recht und Völkerrecht,* V (1935), pp. 58, 59. In the course of the discussions preceding the admission of Soviet Russia into the League there was no tendency, even on the part of the States opposing the admission, to assert categorically that admission would imply the recognition of its Government by all members of the League. The representative of Portugal merely asked questions: "Are we to have recognition in Geneva and non-recognition elsewhere? . . . Will not the admission of the Soviet Union into the League logically and necessarily involve the *de jure* recognition of the Soviet Government by the various States?" The Swiss representative pointed out that an affirmative vote of Switzerland "would, in fact, if not necessarily in law, lead to the resumption of regular diplomatic relations." 6*th Committee of* 14*th Assembly*, Special Supplement No. 130, p. 18. After Lithuania had been admitted to the League in 1921 Great Britain informed Belgium, in reply to an inquiry, that "His Majesty's Government are not disposed to accord to Lithuania *de jure* recognition until the situation arising from the dispute about the possession of Vilna becomes clearer."

[2] See Oppenheim, *loc. cit.*, for some examples.

[3] See, e.g., Romano, *Corso di diritto internazionale* (1929), p. 101.

Implied Recognition of Belligerency

Like other aspects of recognition, so also recognition of belligerency is an act fraught with far-reaching consequences both for the recognized authority and for the recognizing State. For the latter it involves the surrender of important maritime rights and the assumption of the obligations of neutrality. It requires all the caution necessary to avoid the reproach of premature recognition. It is clear, therefore, that, as in other kinds of recognition, nothing short of a deliberate intention to that effect can be interpreted as recognition of belligerency. It is not enough that official contact, however regular, is maintained with the rebellious community. For such contact is compatible with the treatment of the rebels as insurgents only. As shown above, official contact, through agents, consuls and even diplomatic representatives previously appointed, can be maintained with governments from which recognition is withheld. The same applies to insurgents.[1]

Neither is there any valid reason for assuming recognition of belligerency on the ground that a State has voluntarily imposed upon itself and its subjects some of the restraints of neutrality. Thus the Government and the courts of the United States have repeatedly held that the application of the Neutrality Act is not dependent upon the recognition of belligerency and that it is fully compatible with a mere condition of insurgency. The British Government and British courts have adopted the same view with regard to the Foreign Enlistment Act. Even a formal declaration by a government calling upon its subjects to observe neutral conduct does not constitute implied recognition of belligerency. During the Cuban insurrection in 1895 the President of the United States issued a proclamation in which he enjoined the observance of the United States Neutrality Act and which in many respects was hardly distinguishable from a proclamation of neutrality.[2] But the United States emphatically refused to grant recognition of belligerency. During the Spanish Civil War of 1936–8 Great Britain declared the Foreign Enlistment Act to be applicable. She adopted legislation in the matter of export and transport of munitions going beyond the requirements of the Act and of accepted duties of neutrality. At the same time, together with other States she repeatedly refused to recognize a state of belligerency. It is true that there is no express formula for recognizing belligerency, but practice shows that when governments intend to grant belligerent rights they leave no doubts as to their intention. During the struggle of the Latin-American Republics for independence Great Britain and the United States declared repeatedly that they were treating both the mother country and the rebellious provinces as equal parties to the war. A formal proclamation of neutrality is clearly the best method of giving expression to the intention to grant belligerent rights. That was the procedure adopted by Great Britain and other States during the American Civil War. But although a proclamation of neutrality is not the only way of recognizing belligerency there must be a clearly expressed intention to that effect. It cannot lightly be inferred from conduct which, as we have seen, may in some matters be indistinguishable from recognition of belligerency while differing from it fundamentally. It is certainly not permissible to thrust it upon a State which expressly disclaims any such intention. From the fact that a formal declaration of neutrality is not necessary for recognition of belligerency, we are not entitled to draw the facile conclusion that we are at liberty to interpret as such any particular line of conduct from which, in our view, there follows "in law and logic"[1] the admission of full belligerent rights. It may be argued that a State is not free to act in a way fully consistent with recognition of belligerency and yet maintin that its action does not amount to recognition. To put forward that argument is to beg the question as to the meaning of recognition of belligerency and to disregard the fact that the essence of it is the intention to concede fully and comprehensively the exercise of belligerent rights as distinguished from acquiescence in the exercise of certain rights—such as is present in mere recognition of insurgency—or from the maintenance of regularized intercourse.

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[1] There is no legal objection to maintaining normal channels of communication with an authority which has established itself in a considerable part of the territory of the country concerned and whose measures in the commercial and other fields affect the interests of foreign states. It is impracticable to disregard the fact that there are two effective authorities in the country torn asunder by a civil struggle. This being so, there was no reason to assume that the British and other Governments, by agreeing in the course of the Spanish Civil War of 1936–8 (see above, p. 138) to the appointment of agents to and from the insurgent authority, were taking a step which they expressly disclaimed to take, namely, the recognition of the insurgents as belligerents. It is neither necessary nor permissible to identify the regularized maintenance of intercourse with the significant process of recognition.

[2] Moore, *op. cit.*, vol. VII, p. 1081.

Conclusions

It is convenient to summarize briefly the conclusions of this article. There is no implied recognition in the fact of a State becoming a party or continuing as a party to a multilateral treaty to which an unrecognized State is or becomes a party. Neither does that effect attach to participation in an international conference attended by an unrecognized State or government; to retention and continued maintenance (as distinguished from appointment), for an interim period, of diplomatic representatives; to retention, replacing, sending and reception of consuls and, possibly, though this is controversial, to a request for and acceptance of an exequatur for them (as distinguished, probably, from the issue of an exequatur); to the sending of agents and representatives not possessing diplomatic character; to the fact, form and manner of communication with and address of foreign authorities, especially in connection with the protection of nationals; to request for and grant of extradition; to the maintenance of contacts with the insurgents in a civil war; to admission to an international organization such as the League of Nations. Such controversial evidential value as may otherwise attach to any of these acts is further reduced, if not altogether eliminated, by the proclaimed assumption of a policy or of an obligation of non-recognition. A State committed to such policy or obligation is bound to choose an express and unequivocal mode of recognition if it wishes to depart from its general policy as publicly announced. The only legitimate occasions for implying recognition are: (1) the conclusion of a bilateral treaty which regulates comprehensively the relations between the two states (and which must be distinguished from temporary arrangements and agreements for limited purposes); (2) the formal initiation of diplomatic relations and, probably, the issue of a consular exequatur; and (3) in the case of belligerency, a proclamation of neutrality or some such unequivocal act.

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[1] Smith in *British Year Book of International Law*, XVIII (1937), p. 29. It is therefore doubtful whether "belligerent recognition is a matter of conduct, not of words" (*ibid.*, p. 28). Recognition of belligerency—like any other recognition—is a matter of intention. In *Great Britain and the Law of Nations*, vol. I (1932), p. 79, Professor Smith deprecates the tendency to imply recognition from intercourse with unrecognized authorities. See also O'Rourke in *American Journal of International Law*, XXXI (1937), p. 408. In *The Ambrose Light*, which is an isolated case in the matter of recognition of belligerency by implication, the court held that a note sent by the American Secretary of State amounted to "recognition by implication of a 'state of war' and of belligerent rights, sufficient to prevent subsequent condemnation of rebel vessels as piratical" (25 Fed. Rep. 408). See, on the other hand, *The Conserva* (1899), 38 Fed. 431, 437.

These conclusions are, on the face of it, of a negative character with regard both to the doctrine of implied recognition as a whole and to its particular manifestations. It is not believed that, in view of this negative result, a discussion of this subject ought to have been avoided. The proper understanding of recognition as an institution of international law has suffered, in an equal degree, from two causes. The first, and by far the more important, has been the conception of recognition as an unfettered act of national policy divorced from any element of legal duty to the community claiming recognition or to the international community at large—an aspect of the subject of recognition which is outside the purview of the present article. The second and, by comparison, minor cause has been the exaggerations and the artificialities of the doctrine of implied recognition. That doctrine, often supported by no mean authority,[1] has been here exposed to criticism. It has been shown, in the first instance, that there can be no question of implied recognition so long as the State whose action is so interpreted manifests a contrary intention. It is permissible to infer implied recognition from a line of conduct only when there is clear evidence that such effect was intended by the State in question.[2] Whenever the law implies a condition of things or a legal result it does so as a rule for the reason that the other party or parties have been led or are likely to be led to rely on some defined manifestations of will. Even in those cases in which municipal law attaches consequences to acts of parties regardless of their intention, it does so, as a rule, only when there is no express declaration to the contrary. There is no good reason why a greater rigidity should prevail in what has been called the rougher jurisprudence of states. Recognition—of States, of governments, of belligerency—is a matter of primary significance in the life of States. It is an important occasion calling for formal and deliberate declarations of will. It is undesirable that its significance should be obscured by a spurious importation of the refinements of implied recognition. This is so irrespective of whether there has been any general manifestation of an intention not to grant recognition. Recognition must be express and unequivocal. It has been the main purpose of the present article to attempt to show that this view is in accordance both with principle and with the practice of governments.

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[1] See, for instance, Moore, vol. I, p. 73, who says: "Recognition is not necessarily express; it may be implied, as when a State enters into negotiations with the new State, sends it diplomatic agents, receives agents officially, gives exequaturs to its consuls, forms with it conventional relations". Article 9 of the Resolutions on the Recognition of New States and New Governments adopted in 1936 by the Institute of International Law provides that recognition *de facto* of new States "results either from an express declaration or from an act implying this intention, and as an agreement or *modus vivendi* having a limited purpose or a provisional character" (as translated in *American Journal of International Law*, 30 (1936), Suppl., p. 186). According to Article 14 of the Resolutions: "Recognition *de facto* of a new government is manifested: (1) either by an express declaration, (2) by the signing of agreements having a limited purpose or a provisional character, (3) or by the maintenance of relations with the new government for the purposes of current affairs (*ibid.*, p. 187). Most of these instances of implied recognition have here been shown to be inconclusive.

[2] Professor Briggs, in a useful survey of authorities, urges reliance on the intention of governments as distinguished from implied recognition. This is so because, in his view, the granting or withholding of recognition is a matter of policy (*American Journal of International Law*, 34 (1940), p. 51. Probably the same result follows, even more cogently, from the view that recognition is a matter of law.

Undoubtedly, it is a sound precept of law that a State should not be allowed to cause confusion and to disappoint legitimate expectations by blowing hot and cold at the same time—by acting in a manner implying recognition and by denying any intention to that effect. However, to enounce that maxim is merely to state the issue. For the question is: what is the manner of conduct which may legitimately be held to imply recognition? It has been shown that, in practice, such conduct has been held to be confined within a narrow compass. The legal significance of recognition is too far-reaching to permit it to become a prey of ingenious deductions and an object of uncertainty and controversy. States must in this matter retain freedom to act without having to discover that, without willing it and even while denying it,[1] they have committed themselves to recognition. Clearly, occasions may arise when some formula other than the express words of recognition may be helpful.[2] The establishment of diplomatic relations and the conclusion of a bilateral treaty of a comprehensive character may properly be used for that purpose. Apart from these, it is improper that a legal act of profound significance should be exposed to the vagaries and abuse of inference. It is possible—as it is certainly desirable—that the function of recognition may in the future be freed from the vicissitudes of individual action of States and that collective recognition in all its aspects may become a rule of international law and organization. Pending that consummation it is imperative that the science of international law should free the doctrine of recognition from the confusing exaggerations of the notion of implied recognition which find no support in the practice of States and which are inimical to that minimum of intercourse which is often unavoidable even in the absence of recognition.

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[1] During the Spanish Civil War of 1936–8 the British Government—alongside of other Governments—deliberately and consistently refused to grant recognition of belligerency. But writers expended much ingenuity in an attempt to prove that such recognition had in fact been granted by implication.

[2] See above, p. 130. In the exchange of communications between the United States and Soviet Russia in November 1933, the two Governments informed one another of their decision to establish normal diplomatic relations, to exchange ambassadors, and to co-operate for their mutual benefit and for the preservation of the peace of the world (*American Journal of International Law*, XXVIII (1934), Special Supplement, p. 2). There was an advantage in not referring *expressis verbis* to recognition, the grant of which had been repeatedly refused in uncompromising and solemn language.

NOTES

THE GOVERNMENT OF OCCUPIED TERRITORY

THE second Great War has emphasized even more clearly than the first the archaic character of the Hague Conventions. Although drafted in their present form in 1907, the substance of the rules is mostly derived from the Brussels Conference of 1874. They speak the language of nineteenth-century political institutions and of nineteenth-century war. The age of liberalism took a narrow view of the functions of the State and envisaged war mainly as a trial of strength between opposing professional teams in which civilians would play the rôle of spectators. The law attempted to confine the players strictly within the white lines on the field and to limit as far as possible any inconvenience to the spectators. Sharp distinctions were drawn between the functions of the State and those of the individual, between State and individual property. Under modern conditions these distinctions have everywhere become blurred and often obliterated.

Nowhere is this more evident than in the short text which purports to lay down rules for the exercise of "Military Authority over the Territory of the Hostile State". These rules occupy only fifteen articles (42–56) of the Regulations annexed to the Fourth Hague Convention of 1907. The background against which they are projected is that of warfare in the middle of the nineteenth century, if not earlier. The rules envisage an invading army which is trying to "live on the country" and they seek to confine its exactions strictly within the narrowest limits of immediate military requirements. Eleven out of the fifteen articles are concerned with questions of material property. Pillage and the confiscation of private property are forbidden, but provision is made for requisitions and contributions. War material may be seized, but must be restored or paid for if it is privately owned. The property of local authorities, churches, etc., is to be treated as private property, and the occupying power only enjoys the right of usufruct over the immovable property of the enemy State.

All these rules have little to do with the real problems which now face an occupying power. In Italy, with which this article is chiefly concerned, the actual facts are often the exact opposite of those which were envisaged by the draftsmen of the rules. So far from living on the country, the first task of the occupying army is now to feed a starving population and to supply it with a hundred other necessities. Public services deliberately destroyed by the retreating enemy have to be restored to working order. Official records have been burned and police forces broken up. The enemy policy of "scorched earth", which means the maximum of devastation, and the practice of deliberately driving thousands of refugees towards the Allied lines have created problems of urgent relief and administration on a very large scale.

Many of these problems were foreseen, and for this reason the organization of what we now call "Civil Affairs" formed an important part of the operational planning of the invasion. This was only full realized when it became necessary to make plans for the occupation of Italian territory in Europe. In the operations which led to the occupation of enemy territories in Africa plans had not been fully worked out in advance, and for the most part an organization had to be improvised. In these territories very valuable work was done by officers hastily recruited from various colonial civil services, but experience showed the need for more elaborate preparation. This problem was first seriously tackled in the autumn of 1942, and part of the preparation consisted of the establishment of special training schools for officers who would take over all responsibilities connected with the civil population.

In the planning for the invasion of Italy, Great Britain and the United States were regarded as joint "occupants" within the meaning of Article 43 of the Hague Rules—perhaps the first example in history of such a joint occupation. The command of the whole operation was entrusted to General Eisenhower, who was responsible to the Combined Staffs. Acting in the name of the two governments, General Eisenhower appointed General Alexander, then Commander-in-Chief of the 15th Army Group, as Military Governor of the territories to be occupied. Subject only to general directions on the larger questions of policy, General Alexander was thus invested with the actual exercise of the authority which the law of nations vests in an occupying power.

Under modern conditions it is obviously impossible for a Commander-in-Chief to devote much personal attention to the task of military government, but it is also necessary that the officer directly responsible should hold high rank. The solution of this problem was to organize military government as a special branch of the Commander-in-Chief's staff. The organization thus created was described as the "Allied Military Government of Occupied Territory" ("AMGOT"),[1] and the appointment of "Chief Civil Affairs Officer" (CCAO) was given to Lord Rennell of Rodd, who held the rank of Major-General. Lord Rennell's deputy was an American officer, Brigadier-General McSherry, and the whole organization was Anglo-American at all levels. The first Chief Legal Officer was Colonel Chanler, who in civil life was chief counsel to the City of New York.

The functions of AMGOT have ranged over a wide field, but in this article it is only possible to deal in any detail with the legal side. Upon this very important problem the Hague Rules give us no guidance beyond the vague words in Article 43 which lay down that the occupant "shall do all in his power to restore and ensure, as far as possible, public order and safety (*l'ordre et la vie publics*), respecting at the same time, unless absolutely prevented, the laws in force in the country". Since nothing whatever is said about the means whereby this obligation is to be discharged, we must assume that the occupying power enjoys a wide measure of discretion.

It was decided to keep the legal staff of AMGOT distinct from the existing Judge-Advocate-General's Department of the normal Army administration, the latter remaining responsible for courts-martial and for legal problems arising within the armed forces. On the military government side the legal branch of the Civil Affairs staff was organized under the Chief Legal Officer in two sections, the judicial and the advisory. The task of the judicial section was to organize and administer the Allied Military Courts, to prosecute offenders against the proclamations, to examine petitions, to review cases, and to supervise the work of the Italian courts, when these were reopened. The advisory or counsel section was charged with the drafting and translation of all proclamations and other legal documents, as well as advising the Chief Civil Affairs Officer and subordinate departments upon all legal questions.

"The authority of the power of the State (*l'autorité du pouvoir légal*) having passed *de facto* into the hands of the occupant" (Article 43), the Commander-in-Chief, as Military Governor, becomes the legislative authority for the occupied territory. In Italy the medium of his legislation is the Proclamation, and the machinery of enforcement is the Military Court.

Many of the more important proclamations were prepared during the planning stage and were posted up as soon as territory was occupied. The first proclamation[2] was in effect an announcement of the occupation and a warning to the population to obey all orders of the military government. The second proclamation, which followed immediately, was really a summary criminal code, giving a list of prohibited acts and the penalties attached to them. The maximum of these penalties was scaled high, not with the intention that a maximum punishment should normally be imposed, but in order to retain a reserve power of severe action should this prove to be necessary. The fourth article of this proclamation provided that any offence under the Italian Penal Code or under communal ordinances might be tried by a military court, if the Military Governor should so direct. In effect this incoporated the whole Italian criminal law into the law of military government, but this again was a reserve power, and it was not intended that military courts should normally try offences under Italian criminal law.[1]

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[1] This was afterwards changed to "AMG". In the occupied African colonies the term used was "Occupied Enemy Territory Administration" ("OETA").

[2] Printed below at p. 155.

The third proclamation introduced an Allied military currency and fixed its value.[2] The fourth, which is printed below,[3] set up the system of Allied military courts. Other early proclamations provided for a variety of matters, such as the temporary closing of banks and a moratorium (No. 5), the control of the press and public meetings (No. 11), rationing and the fixing of prices (No. 8), etc. One that calls for special notice is the proclamation (No. 7) which dissolved the Fascist Party and confiscated its property, at the same time providing for the continuance of any charitable or beneficial activities carried on under party auspices. This Proclamation also provided for the suspension of discriminatory laws based on differences of race, colour, or creed.[4] Another proclamation of interest is that which established the office of Controller of Property (No. 6). The functions of this official are to take over and administer property falling into one of three classes:

(i) the property of Allied Governments and nationals which had been sequestered by the Italian Government;
(ii) property belonging to the Italian Government and not already in the custody of some branch of the Allied Forces; and
(iii) the property of absentee owners who had no local representative.

A few words upon the mechanics of legislation may be of interest. Proclamation No. 1, which announced the invasion and occupation, was for general information, and the first legislative act was Proclamation No. 2, which gave a list of offences and penalties. The last article (Art. 8) of this and other proclamations ran as follows: "This Proclamation will become operative in each province[5] or part thereof on the date of its first publication therein." In the early stages of the operation publication was effected by posting up copies in the places where it was usual to post up Italian official notices. As soon as possible arrangements were made for the issue of an official "Gazette", which was given a legal status by Proclamation No. 9, and subsequent proclamations took legal effect from the date of their publication in the "Gazette". In the event of any discrepancy between the English and Italian texts the English text prevailed.

All legislation became operative automatically in each province as soon as any part of the province was in fact occupied, and it was therefore unnecessary to accompany each advance with new proclamations. This is in accordance with the principle laid down in the first of the Hague Rules (Art. 42) that occupation is purely a question of fact.

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[1] This proclamation was accompanied by notices imposing a curfew and calling for the surrender of arms, ammunition, explosives, and wireless sending sets.

[2] £1 = $4.00 = 400 lire.

[3] P. 156.

[4] The text of Art. 4 runs as follows: "The Chief Civil Affairs Officer will by Order annul, amend, or render inoperative any law in force in the Occupied Territory which relates to a Fascist organization or any dependent or allied organization thereof, or which affects prejudicially the United States or Great Britain or their nationals or any other of the United Nations or their nationals, and any law which discriminates on the basis of race, colour, or creed, and he may also by any such order provide penalties for the failure to observe or perform the same."

[5] The Italian *provincia* is the equivalent of the French *département*.

Due provision was made for the delegation of legislative power. Legislation upon all matters of major importance took the form of a "Proclamation" published in the name of the Commander-in-Chief as Military Governor, but in many matters there was a delegation of authority to the Chief Civil Affairs Officer to legislate by means of a "General Order". For example, a general moratorium was imposed in the earliest stage of occupation by Proclamation No. 5, but the CCAO was empowered to suspend or terminate the moratorium in whole or in part in any part of the occupied territory. Provision was also made for the further delegation of authority to subordinate officers at various levels.

After the last war the Belgian courts took the view that legislation enacted by the occupying power did not have the character of true law and should be regarded merely as a series of military orders.[1] This narrow view is now generally disapproved, and there can be no doubt that the occupying power, within the limits laid down by the law of nations, possesses a definitely legislative authority in the occupied territory. Indeed, we may go further and say that the occupant is under a positive obligation to enact such laws as may be necessary for the good government of the territory which he controls. From what has been said it will be clear that the Allied Military Government in Italy acts upon the assumption that its enactments have the force of true laws.

Let us now turn to the administration of justice. As will be seen from the text of Proclamation No. 4, three grades of courts were established. The main difference between these courts lay in their powers of imposing punishment. The grading was not a judicial hierarchy in the sense that there is any appeal from lower to higher courts. The system set up does not provide for any appeals in the true sense, but convicted persons have the right of petition, the petition being addressed to the Chief Legal Officer. This right has been widely exercised. Provision is also made for the review of all cases in which heavy sentences have been imposed.

It will be noticed that the jurisdiction of the military courts covers all persons in the occupied territory except members of the Allied forces and prisoners of war. The latter are excluded because full provision for the discipline of prisoners of war is made in the Geneva Convention of 1929. Members of the Allied forces are not subject to the jurisdiction of any Italian courts, civil or criminal, and offences committed by them can only be tried by the appropriate courts-martial. There is no power in the courts to give civil remedies, but the Claims Commission may award compensation to injured persons in cases where the claim is against public funds.

The procedure of the courts is regulated by rules made by the Chief Civil Affairs Officer. The rules have been made as simple as possible, bearing in mind that they have to be understood by Italian lawyers and police accustomed to quite a different system. An important concession to continental practice has been made in dispensing with the technical English or American rules of evidence, the courts being given a wide discretion to hear whatever evidence they may consider relevant and to attach to all evidence such weight as they may think fit. To this there is one exception, it being expressly laid down that evidence of bad character or previous convictions must not be produced before conviction. Apart from evidence, the general structure of the procedure is Anglo-American rather than continental. The proceedings open with a plea of "guilty" or "not guilty" and the evidence is brought out by examination and cross-examination. In general, the procedure resembles that of an English police court. At first Italian defendants and their lawyers found some difficulty in understanding this procedure, since

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[1] See *Mathot* v. *Longué* (1921), *Annual Digest*, 1919–22, p. 463.

Italian criminal procedure is based on the examination of the accused. This difficulty seems to have disappeared, and the people in general are satisfied with the justice administered by our courts. Decisions and sentences are not disturbed upon review unless the reviewing authority is satisfied that injustice has been done to the accused.

The scope of this article is limited to the period when military government is closely connected with operations still in progress. As has been explained in the press, the plan provided for an intermediate stage in which government would be administered by an Allied Control Commission, to be followed by the gradual transfer of authority to the Italians themselves. The transfer to Italian authority was effected by a final Proclamation, which terminated military government in the transferred provinces and restored the Italian sovereignty.

H. A. SMITH.

ANNEX I

ALLIED MILITARY GOVERNMENT OF SICILY AND ADJACENT ISLANDS

PROCLAMATION No. 1

To the People of Sicily and Adjacent Islands.

Whereas in prosecuting their war against the Axis Powers, it has become necessary for the armed forces of Great Britain and the United States under my command to occupy Sicily and Adjacent Islands; and

Whereas it is the purpose of the Allied Powers to deliver the people from the Fascist régime which led them into war, and to restore Italy as a free nation, and

Whereas it is the policy of the Allied Forces not to make war upon the civilian inhabitants of the occupied territory but to protect them in the peaceful exercise of their legitimate pursuits in so far as the exigencies of war and their own behaviour will permit, and

Whereas in order to preserve law and order and provide for the safety and welfare both of my troops and of yourselves, it is necessary to establish Military Government in the occupied territory.

Now, therefore, I, HAROLD R. L. G. ALEXANDER, G.C.B., C.S.I., D.S.O., M.C., General, General Officer Commanding the Allied Forces in Sicily and Adjacent Islands and Military Governor of the Territories Occupied, do hereby proclaim as follows:

I

All powers of government and jurisdiction in the occupied territory and over its inhabitants, and final administrative responsibility are vested in me as General Officer Commanding and Military Governor, and the Allied Military Government of Occupied Territory is established to exercise these powers under my direction.

II

The exercise of the powers of the Crown of Italy shall be suspended during the period of military occupation.

III

All persons in the occupied territory will obey promptly all orders given by me or under my authority and must refrain from all acts hostile to the troops under my command or helpful to our enemies, from all acts of violence, and from any act calculated to disturb public order in any way.

IV

Your existing personal and property rights will be fully respected and your existing laws will remain in force and effect except in so far as it may be necessary for me in the discharge of my duties as General Officer Commanding the Allied Forces and as Military Governor to change or supersede them by proclamation or order issued by me or under my direction.

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[1] Since I have been in some ways personally concerned with the matters discussed in this article, I think it well to make clear that no use has been made of any unpublished material. The responsibility for any expressions of opinion is entirely my own. In technical details it should not be assumed that the Italian precedents will be followed in all future cases.

H. A. S.

V

The Fascist Party will be dissolved and all discriminatory decrees and laws will be annulled.

VI

All administrative and judicial officials of the provinces and communes and all other government and municipal functionaries and employees, and all officers and employees of state, municipal, or other public services, except such officials and political leaders as are removed by me, are required to continue in the performance of their duties, subject to my direction or the direction of such of my officers of the Allied Forces as may be deputed for that purpose.

VII

Further proclamations, orders, and regulations issued by me or under my authority from time to time will specify what is further required of you, and what you are forbidden to do, and these will be displayed in court houses, police stations, or other public places.

VIII

So long as you remain peaceable and comply with my orders, you will be subject to no greater interference than may be inevitable in view of military exigencies, and may go about your normal vocations without fear.

H. R. ALEXANDER, General.
General Officer Commanding the Allied Forces
and Military Governor

Dated: 1943[1]

ANNEX II

ALLIED MILITARY GOVERNMENT OF SICILY AND ADJACENT ISLANDS

PROCLAMATION No. 4

ALLIED MILITARY COURTS

Whereas by Proclamation No. 1 issued on the day of 1943, I assumed all powers of government over the territory in Sicily and Adjacent Islands occupied by the Allied Forces under my command, and

Whereas by Proclamation No. 2 issued on the said day of , 1943, I established offences to be tried by Military Courts and prescribed punishments therefor,

Now, therefore, in order to establish Military Courts for the trial of offenders against the proclamations and orders issued under the authority of the Allied Military Government, I, Harold R. L. G. Alexander, G.C.B., C.S.I., D.S.O., M.C., General Officer Commanding the Allied Forces in Sicily and Adjacent Islands and Military Governor of the Occupied Territory, hereby proclaim as follows:

Article I

CREATION OF ALLIED MILITARY COURTS

Allied Military Courts for the occupied territory are hereby established. There shall be General Military Courts, Superior Military Courts, and Summary Military Courts, the constitution and competence of which shall be as set forth in Article III.

Article II

JURISDICTION

Section 1. *Over Territory.* Jurisdiction of every Allied Military Court shall extend to the whole of the territory occupied by the Allied Forces, and, as regards each part of the territory, from the time at which that part was first occupied.

Section 2. *Over Persons.* Jurisdiction of every Allied Military Court shall extend to all persons in the territory except (*a*) members of the Allied Forces; and (*b*) persons who are treated as prisoners of war under the Geneva Convention of July 27, 1929.

Section 3. *Over Offences.* Allied Military Courts shall have jurisdiction over:

(*a*) All offences against the laws and usages of war;
(*b*) All offences under any proclamation, order, or regulation issued under the authority of the Allied Military Government;

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[1] The date was filled in by rubber stamp according to the date at which territory was occupied.

(c) Any offence under the Italian Penal Code, or under the Ordinances of any commune, provided the Military Governor or an officer acting under his authority shall have ordered the trial of the case or class of cases by a Military Court.

ARTICLE III

CONSTITUTION OF ALLIED MILITARY COURTS

Section 1. *General Military Courts.* A General Military Court shall consist of not less than three officers, at least one of whom shall be a Judicial Officer of the Allied Military Government. A General Military Court shall be competent to try all offences within the jurisdiction of the Allied Military Courts, and to impose any lawful punishment.

Section 2. *Superior Military Courts.* Superior Military Courts shall consist of one or more officers of the Allied Forces, at least one of whom shall be a Judicial Officer of the Allied Military Government if available. A superior Military Court shall be competent to try all offences within the jurisdiction of the Allied Military Courts and to impose any lawful punishment other than death or imprisonment for more than ten years.

Section 3. *Summary Military Courts.* Summary Military Courts shall consist of one officer who need not be a Judicial Officer, but may be any officer of the Allied Military Government if available, or otherwise any officer of the Allied Forces. A Summary Military Court shall be competent to try all offences within the jurisdiction of the Allied Military Courts other than offences for which the maximum punishment is death, and to impose any lawful punishment except death or imprisonment for more than one year, or a fine of more than 50,000 lire, or both such imprisonment and fine.

ARTICLE IV

PROCEDURE

Section 1. *Public Sessions.* The proceedings of every Allied Military Court shall be public except when otherwise ordered by the Chief Civil Affairs Officer or the Court.

Section 2. *Rights of Defendants.* Every defendant before an Allied Military Court is entitled:

(*a*) To have in advance a copy of the charges upon which he is to be tried, if he so desires;

(*b*) To consult a lawyer before the trial and have a lawyer or other representative of his own choosing defend him at the trial, except that the Chief Legal Officer or any Court may at any time prohibit any lawyer or other person from appearing in any Court. In any case before a General Military Court, the Court may at the request of the defendant or otherwise, assign to him an officer to assist in the defence of the case;

(*c*) To apply to the Court for further time to prepare his defence, which application the Court may grant or deny in its discretion;

(*d*) To bring with him such material witnesses as he may desire or have them summoned by the Court at his request;

(*e*) To give evidence on his own behalf at the trial, but he may not be compelled to do so;

(*f*) To have the proceedings translated for his benefit when he is unable to understand them otherwise.

Section 3. *Rules of Procedure.* The Chief Civil Affairs Officer shall make rules of procedure for the Allied Military Courts.

Section 4. *Assessors.* Every Military Court may appoint one or more assessors to sit with the Court. The duty of the assessors shall be to give such advice or assistance on any question as the Court may request.

ARTICLE V

IMPRISONMENT, FINES AND OTHER PENALTIES

Section 1. *Previous Convictions.* Before imposing sentence upon any person found guilty by an Allied Military Court, evidence of good or bad character including any prior criminal record of the defendant before either military tribunals or the civil courts may be received and considered by the Court in determining the sentence to be imposed.

Section 2. *Fines.* Where under any proclamation or order an offence is made punishable by fine, the Court imposing the fine may give such directions as appear to be just with respect to the payment of the fine and in default of payment of whole or part thereof may order the defendant to be committed to prison. Any such direction or order shall, for the purpose of review, be considered as part of the sentence.

Section 3. *Order as to Residence.* The General Military Court or a Superior Military Court, in lieu of or in addition to any other lawful punishment, may direct that the defendant establish his place of residence within a specified area.

Section 4. *Confiscation.* If under any proclamation or order a defendant shall be convicted of wrongful sale, purchase, use or possession of any article, a Military Court, in lieu of or in addition to any other lawful punishment, may order restitution or compensation to the owner, or the forfeiture to the Allied Military Government of such article.

Section 5. *Padlocking.* If under any proclamation or order a defendant shall be convicted of an offence involving the sale of a harmful article or the operation of an improper place of business, a Military Court in lieu of or in addition to any other lawful punishment, may order that such place be vacated or closed for a fixed time.

Section 6. *Suspension of Sentence.* A Military Court may direct that the whole on any part of a sentence of imprisonment imposed by it shall be suspended, on such terms as to good behaviour together with such other conditions (if any) as the Court may impose. A subsequent conviction for any offence by an Allied Military Court shall have the effect of putting into operation any suspended sentence which the defendant may not have served unless the Court otherwise directs.

Article VI

GENERAL POWERS OF COURTS

An Allied Military Court may make such orders and do all such acts and things as may be requisite for the due administration of justice and, without prejudice to the generality of the foregoing provision, may grant bail, accept and forfeit security therefor, make orders for the attendance of witnesses with or without documents, administer oaths, make orders for the disposal of exhibits, and punish contempt of court.

Article VII

REVIEW

Section 1. *Right of Petition.* Any person convicted by a Military Court may, within thirty days after the imposition of sentence, file with the trial court or forward to the Chief Legal Officer, a petition, addressed to the Chief Civil Affairs Officer, submitting reasons why the conviction should be set aside or the sentence should be modified.

Section 2. *Disposition of Record.* Every record of trial by an Allied Military Court shall be transmitted to the Chief Legal Officer for examination and file.

Section 3. *Powers on Review.* The record of any case may, on the recommendation of the Chief Legal Officer, and shall, in the event of a sentence exceeding two years' imprisonment or a fine of 50,000 lire, be reviewed by the Chief Civil Affairs Officer or by an officer of the Allied Military Government not below the rank of Colonel who may be appointed by the Chief Civil Affairs Officer for that purpose. The reviewing authority shall have power to set aside any conviction, to suspend, reduce, or commute the sentence, or to order a new trial.

Article VIII

CONFIRMATION OF DEATH SENTENCES

No sentence of death shall be executed unless and until confirmed in writing by the Military Governor of the occupied territory, or by a specified officer not below the rank of Brigadier-General or Brigadier to whom he may have delegated such power in writing.

Article IX

POWER TO MAKE ORDERS

The Chief Civil Affairs Officer may make and from time to time amend such orders or regulations as he may deem requisite for the purpose of this or any other proclamation issued by me.

Article X

EFFECTIVE DATE

This Proclamation will become operative in each province or part thereof within the occupied Territory on the date of its first publication therein·

H. R. ALEXANDER, General,
General Officer Commanding the Allied Forces
and Military Governor.

Dated: , 1943.

LEGITIMATE OBJECTIVES IN AIR WARFARE

The war in the air is part of the general war and no study of it can be complete unless it embraces certain questions affecting the operations by land and sea as well. The conduct of hostilities in each of the three elements reacts upon the conduct in another. The rules of war applicable to each are not rigidly bulkheaded; nor are the rules relating to neutrality. The latter rules have undoubtedly suffered something in the nature of a seachange in the present war. They do not look quite the same to-day as they did in 1939. There has been, as Dr. Lauterpacht has pointed out, a tendency on the part of neutrals to abandon numerous rights hitherto jealously asserted against belligerents, and at the same time to strengthen their position in certain other ways. The comprehensiveness of modern warfare, as he also points out, has brought it about that belligerents now claim to be entitled to exert economic pressure upon the enemy by interfering with commerce in ways which would not have been tolerated in earlier wars.[1] Such developments cannot be disregarded in any study of the international law of the war, in whatever element it is mainly waged. They are part, however, of a wider survey than that which is attempted here and which is confined to the limited subject indicated by the title. That the other questions exist and are not being overlooked here, but merely being side-tracked, is a necessary addendum to the present pages.

The war in the air has witnessed some developments of importance, peculiar (subject to what is stated above) to itself. Two of them overshadow all the rest, and it is proposed in this paper to confine attention to these. Thus to limit the scope of the inquiry is not to suggest that nothing else has happened in the air which is worthy of consideration by international lawyers. It is rather to recognize the need for selective treatment of a subject which could not be dealt with adequately within reasonably small compass if every possible question were discussed.

It was in the character and magnitude of the operations conducted against shipping and against industrial centres on land that the difference between the kind of air warfare that was possible in the first world-war and that which can now be waged was most clearly apparent. In that war there had been attacks from the air both by sea and by land, but they were on a small scale and relatively unimportant. In the present war they have been far more widespread and more formidable.

No definite rules regarding air operations against shipping had been agreed internationally before the war began. An attempt to formulate rules upon the subject was made by the Commission of Jurists who met at The Hague in the winter of 1922–3. A draft code for air warfare was drawn up, but it included no provision for this particular purpose. The jurists were unable to agree upon one detail which can be seen in the retrospect to have been really a minor one. It was whether belligerent aircraft should have the right to order a merchant vessel by signal to proceed to some place (e.g., a port) where she could be visited and searched, or whether, before she was so ordered, the aircraft was bound to alight on the water and board the vessel. It was on this question, namely, whether *visite sur place* was obligatory or not, that the vote of the Commission was split. The British delegation, fearing that unless a reasonable diversion was allowed worse might happen, opposed the proposal, strongly supported by the American delegation, that visit at the place of encounter should be declared necessary. The Japanese and Netherlands delegations agreed with the American, the Italian with the British. The French delegation was not in agreement with either view.

While thus unable to speak with one voice on the subject, the Commission agreed, nevertheless, in condemning by implication any resort by aircraft to the method of "sink at sight" practised by the German submarines in the first world-war. "All the delegations", the Commission's report stated, "are impressed with the necessity of surrounding with proper safeguards the use of aircraft against merchant vessels. Otherwise excesses analogous to those which took place during the recent war might be reproduced in future wars". "All the delegations", the report stated also, "concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and non-combatants." They differed only as to the means by which this object could best be achieved. "The code of rules proposed by the Commission", they stated finally, "leaves the matter open for future regulation."

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[1] Oppenheim, *International Law*, 6th edition, 1940, edited by Dr. H. Lauterpacht, § 292A, § 390C, note.

There was no such future regulation, and the power of belligerent aircraft to interfere with sea-borne traffic was still undecided when the present war began. Even if the Commission had agreed upon a provision, it should be added, it would not have followed that an international agreement would have been in existence. They did agree upon a draft code regulating a number of other questions, but the code remained a draft and was never transformed into a Convention. For that failure to follow up the work of the Commission the French Government was mainly to blame.

The danger which the British delegation had foreseen at The Hague was soon proved to be a reality when the test of war came. For the first few months the *Luftwaffe* made no attempt to molest shipping. In the middle of December 1939, however, an ominous change occurred. The German air force opened a campaign of merciless attack upon everything afloat in the North Sea. Fishing trawlers were sunk in considerable numbers without warning and without any attempt to provide for the safety of the crews. In January 1940 the lighthouse tender *Reculver* was bombed and sunk. A little later the East Dudgeon lightship was so badly damaged that she had to be withdrawn; her crew of seven took to a boat, but only one man reached land. Over a month later the British Indian steamer *Domala* was bombed and sunk in the English Channel with heavy loss of life. Neutral merchant vessels were also attacked. (The American Neutrality Act of 1937 had not then been repealed and consequently no United States ships were in the areas where German air attack was then practicable). Even lighthouses—at Duncansby Head and Stroma—were not spared. Germany showed herself determined to make all navigation in British waters impossible.

In the first stage of the war British and Dominion aircraft followed the rule advocated by British representatives at The Hague and made a practice of signalling enemy merchant vessels into port for search. On December 2, 1939, the German liner *Watussi* was intercepted off Cape Town by an aircraft of the South African Air Force and ordered to put in to Simonstown, the nearest naval station. After two bombs had been dropped in the sea to enforce the order, the crew scuttled the ship and took to their boats. A little later another German merchant vessel, the *Adolf Leonhart*, also scuttled herself after being intercepted and ordered into port by British aircraft off the coast of Angola. It thus became evident that a scuttling policy had been adopted and was being faithfully followed by all German masters who encountered British aircraft, or, it may be added, British naval forces. In these circumstances Great Britain found it necessary to reconsider her procedure. There was a chance that the ship might possibly be saved and captured, even though damaged, if she were bombed out of hand, for in that event the crew would not have time to take to the boats, opening the sea-cocks at the same time. In the result, Great Britain followed the enemy's lead and abandoned the practice of giving warning.

She did so, but only against enemy vessels, both in surface or sub-surface operations against them and in attacks from the air. Coastal and Bomber Commands at home and the Desert Air Force abroad took a heavy toll of the Axis shipping which hugged the European coast in the North Sea and English Channel and plied between Italy and North Africa in the Mediterranean, respectively. In proportion to the tonnage of Allied and Axis shipping afloat the results of British operations against shipping were far more damaging than those of the *Luftwaffe*.

Great Britain surpassed the enemy, too, in her use of aircraft for the protection of her own merchant shipping. There is no more remarkable chapter in the history of the war than that which records the duel fought far out in the Atlantic between the submarine and the aircraft, shore-based and carrier-borne. In one respect at least the Battle of the Atlantic has a lesson alike for the student of international law and for the practical statesman. It is that to abolish national air forces but not national submarine flotillas might well result in the scales being weighted against a country like Great Britain in any future struggle. The submarine's most dreaded hunter has been the long-range aircraft.

The augmentation of the power of the air offensive against objectives on land has presented problems of still greater interest and complexity to the international lawyer. The second world-war was entered upon before a clear understanding had been reached about the law of war governing bombardment from the air. A rule upon the subject was included in the code proposed by the Commission of Jurists in 1923, but, as already explained, the draft had never been embodied in a Convention, and in any case the provision proposed was in itself not a conspicuously clear one. It adopted the principle of the military objective and abandoned the criterion of defence which is followed in the provisions relating to bombardment by artillery contained in the Land Warfare Rules of 1907. It defined military objectives as "military forces, military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition and distinctively military supplies; lines of transportation or communication used for military purposes". Such objectives were declared to be legitimate targets wherever situated, but a distinction was made between those situated in the immediate neighbourhood of the operations of land forces and those situated elsewhere. In the latter case bombing was prohibited if the objectives could not be attacked without the indiscriminate bombardment of the civilian population. Objectives in the immediate neighbourhood of land operations, on the other hand, might be bombed "provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population".

The rule as thus drafted assumed, it will be noted, that individual factories or other objectives outside the zones of land fighting could be bombed with such particularity that anything describable as "indiscriminate bombing" could be avoided. The same assumption underlay the British Government's view as expressed by Mr. Neville Chamberlain in the House of Commons on June 21, 1938. He was dealing with the bombing of shipping and harbours in Spain, and he stated that while deliberate attack on the civilian population was unlawful, military targets might be bombed if they could be identified and if reasonable care was taken not to bomb civilians in the neighbourhood. That view may still be regarded as holding good in principle, but events of the present war have served to show that the identification of a particular objective is often not practicable, and, even where it is practicable, that the difficulties in the way of the confining of the attack to that objective are immense. That is the result of the measures adopted by the belligerents to disguise and protect their military establishments, armament factories, etc. They have tried by all possible means, first, to prevent the objectives from being identified, secondly, to deprive enemy raiders of any opportunity of attacking under conditions in which precision of aim would be possible.

The most elaborate schemes of camouflage have been adopted for the purpose of misleading the enemy's bomber crews. Whole areas have been so transformed by means of screens of canvas and foliage that their true character, when they are viewed from the sky, could be recognized only with the greatest difficulty. Dummy factories and depots have been erected to attract the raiders' attention. Dummy fires, lighted for the purpose of diverting the attack from the real target, have been other devices for deceiving the raiders. Add to all this the blinding effect of massed cones of searchlights, as well as the buffeting detonations of the anti-aircraft shells, with the harassing tactics of the defending fighter aircraft as makeweight, and one can imagine how difficult it is for even the skilled Pathfinder crews to locate the target when they venture into the perimeter of defence of an important enemy centre. The best they can do is to put down the target-indicator flares on the estimated site of the target, and it is hardly surprising that mistakes should sometimes be made, especially in "10/10ths cloud conditions".

But then, it might be argued, they should not attack at all. They are under no compulsion to venture into such unhealthy places. They should keep away if they can attack only at the cost of inflicting heavy casualties on civilians. This raises the question, Who *are* the civilians in war to-day?

Millions of civilians are employed in armament factories. By no logical process can they be classed with the non-combatants, who are in principle immune from the impact of direct violence in war. Nearly thirty years ago an eminent French jurist drew attention to their *status* in this respect. He pointed out that armament workers "occupy a position intermediate between the combatants proper and the non-combatants who are still employed on their peace-time trades and professions. The reasons for sparing them are losing force. Fundamentally they are almost in exactly the same position as the men of the auxiliary services of the armies, and the latter are certainly legitimate objects of attack".[1] Professor Rolland did not refer to transport workers, but his explanation of the position of the munition worker would apply equally to them. There is no ground for making a distinction between the person who forges a weapon and the person who conveys it from the factory to the front. The latter cannot be classed as a non-combatant now that it is possible to strike at an enemy's lines of supply from the air. He is engaged on work which an enemy has the strongest possible interest in interrupting. The importance of transport in war to-day needs no demonstration. To prevent material of war from reaching the front is as important as to prevent its being manufactured or processed.

The huge army of passive defence, mainly civilian, must also be regarded as *quasi*-combatant. It is obviously illogical to drop incendiary bombs on your enemy's military objectives and then to spare the fire-brigade which tries to extinguish the conflagration or the demolition squad which tries to prevent it from spreading. The present war has witnessed an unprecedented increase in the number of civilian "warriors"—those who make war material, those who transport it, and those who are otherwise directly engaged in services ancillary to active offence or defence. Modern war consumes enormous quantities of munitions and supplies of all kinds, and these have to be made in, and therefore conveyed from, places where the necessary labour is available. Mass-production of material cannot be organized without the concentration of the human agents of it in the large industrial centres. That is the sombre fact which has served to rob the great cities of a belligerent country of the virtual immunity which once they could claim. They have become an integrated part of the whole war-machine. They are part of the war. They do not stand aside from it.

We have to think to-day of a *pre-fabricated battle* in which the field of encounter is merely the place of assembly of components constructed elsewhere. All the preparatory work is done in the centres in which the weapons and supplies are made. There the battle really begins. They have become battle-making towns. That is a change which it is difficult for us to grasp as yet. It is, nevertheless, a change to which we cannot close our eyes, for it is a reality. It is at the heart of the question of international law which is here involved.

If the civilians who suffer in the air raids were only the war-workers, of the various kinds referred to above, there would be no logical case to be made against the bombing of centres of war production. Unfortunately, other civilians who may genuinely claim to be so described live in these centres and suffer as well. The killing or maiming of them is a lamentable and undesired incident of war. There is no chivalrous airman who would not spare the aged and the young if he could. Indeed, it is not to a belligerent's advantage to kill them, for they do not contribute materially to the enemy's war effort and might be classed, in fact, as *bouches inutiles* whom it would be his policy to keep alive. The killing of them is, in short, an evil, and a profitless evil; the pity of it is that it could be avoided only at the cost of a greater evil—greater, that is to say, in the eyes of the belligerent who is asked to forgo attacking. Their fate cannot be held to make unlawful what would otherwise be a lawful operation: which the bombing of a military objective is. It could be condemned only if a different principle were applied to bombardment from the air from that applicable to bombardment from land or sea.

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[1] L. Rolland, *Les Pratiques de la Guerre Aérienne dans le Conflit de* 1914 *et le Droit des Gens*, in *Revue de Droit International*, Paris, 1916, p. 559.

From the broader aspect, the justification of the strategic offensive must rest on the self-defence of the country conducting it. To the charge that it carries the war into regions remote from any scene of surface fighting, and, within those regions, carries it into crowded centres hitherto exempt from its ravages, one must reply that such an extension is the inevitable consequence of the acts of the Government whose country and cities are thus exposed to new perils. The cities in question have been turned in effect into *places d'armes*. In them, as already stated, battle really begins. To give them some sort of sanctuary—for that is what sparing them would amount to—would be to let the first round of the conflict go to the enemy by default.

To the further argument that in striking at the sources of your enemy's armed strength, granted that you are entitled to do so, you are making use of a method and of weapons which cannot be employed in practice without involving in ruin far more than the objectives whose destruction is encompassed, the answer must be that nothing less could accomplish the military object pursued. The "block-buster" bomb of 4,000 lb. or 8,000 lb. weight is the answer to the intensification of the defence. The anti-aircraft gun, too, has been graded up and the interceptor fighter has had its fire-power augmented by the mounting of cannon and rocket guns. The task of a raiding formation has been made immensely more difficult than it was when the war began. To achieve worthwhile results—military results—nothing less than cascade-bombing will suffice. The precision-bombing which was contemplated in the pre-war text-books would be useless, even if it were practicable. The defence has to be overwhelmed. To smother it, the whole area containing the known objective has to be devastated, for it is usually studded with anti-aircraft guns, searchlights and locators, and putting them all out of action calls for a mighty bomb-splash.

Here, again, one has to adjust one's ideas to a new order of war. Very terrible things cannot but happen when agencies of destruction of stupendous force are at the service of belligerents. They are not the monopoly of the air arm. They are to be found in every domain of warfare. Artillery barrages, mine-fields, torpedoes, all the instruments of war have undergone a comparable development. The giant bomb is but one child of a new devil's brood. To dispute on humanitarian grounds a belligerent's right to use it is to attempt to do something which has never been successfully attempted as yet. From the time of the introduction of the cross-bow onwards every attempt to ban a weapon which it is militarily profitable to use has failed. The use of hugh bombs against urban centres of war production *is* militarily profitable. Of that there can now be no such doubt as arises, for instance, in regard to the Germans' use of the flying bomb.

The disrupting of the enemy's war production is only one of the military dividends which the offensive pays. Others are the tying-up of his forces of defence, active and passive, and reducing of the weight of his offensive against his opponent's centres of war production to such a degree as practically to bring it to a standstill. In the second World War, to protect her centres of production, Germany has been driven to concentrate on the construction of fighter instead of bombing aircraft. The output of bombers has declined substantially with the intensification of the British and American air offensive, which has thus served to protect the probable objectives of a German air offensive. The military advantages accruing from such an offensive as that conducted by the British and American air forces against Germany are, in fact, so important that the two belligerent governments concerned could not be expected to forgo them unless the method employed could be shown to be such a brutal one as to be repugnant to humanity. It has not been shown to be such. In these circumstances there has been no inclination to abandon a method of war not forbidden by any specific rule of international law.

J. M. Spaight.

THE MANDATED TERRITORIES DURING THE SECOND WORLD WAR, 1939–42

Apart from its last meeting in December 1939, the Mandates Commission of the League of Nations did not function during the first four years of the second World War. But Great Britain and the other members of the British Commonwealth, as Mandatory Powers, continued to submit to the League annual reports on the territories under their administration. Palestine, Syria and Transjordan, in particular, the "A" Mandates, were deeply involved in the war in the Middle East. Of the "B" and "C" Mandates, New Guinea and the Island of Nauru shared the fate of the islands in the Southern Pacific, which were overrun by Japan.[1]

"A" Mandates

At the outbreak of the War the Palestine Administration at once applied legislation on the lines of the British war measures, including the defence emergency powers, the prohibition of trading with the enemy, the control of the economic life of the country in all its aspects, and the appointment of a custodian of enemy property. Power was given also to constitute the Supreme Court of Palestine as a prize court, and in fact several German prizes were dealt with by the Palestine tribunal. The population of Palestine included a large number of enemy subjects, namely, nationals of Germany. Many were members of the German religious sect known as the "Temple", which had settled in Palestine in the latter part of the nineteenth century and had established flourishing suburbs in Jerusalem, Jaffa and Haifa as well as several prosperous agricultural villages. In addition, a very large number of Jewish German, Austrian and Czech subjects, refugees from Nazi oppression, had immigrated into Palestine since 1933 and were not yet naturalized. The ("Aryan") enemy subjects were either placed in an internment camp in Acre or gathered in the German agricultural colonies, where they were under supervision. The latter were allowed to manage their own agricultural properties, and religious institutions belonging to enemy subjects were not touched.

At the outbreak of war with Germany the High Commissioner of Palestine issued a proclamation that Great Britain was at war, but no proclamation was issued by him that Palestine was at war. Until Italy entered the struggle Palestine was regarded as a neutral by the United States, at least to the extent that American ships were allowed to sail to and from Palestine ports. From the time, however, that Italy came into the war Palestine was brought within the sphere of military operations. Air raids on the coastal towns of Tel-Aviv and Haifa followed immediately. The collapse of France and the ensuing events in Syria brought close the prospect of invasion. One outcome of these events was to stimulate the recruitment of volunteers, particularly amongst the Jews. Their total enrolment in the military, naval and air forces rose to over 20,000; in addition, 7,000 men were enlisted in the defence force. The number of Arabs volunteering was considerably smaller. No attempt was made to introduce conscription. In fact, the Government intervened by legislation in 1942 to check measures of certain Jewish bodies, in relation to volunteering for military service, which were regarded as amounting to coercion. The Government, however, introduced measures for the use of the man power in the defence of the country and in the development of its agricultural and industrial life in order to make it more self-supporting. Palestine was linked in its economic realtions with all the surrounding countries of the Middle East; and the Middle East Supply Centre, which was set up in 1941 after the Conference of Delhi, exercised a large control over local production and foreign trade. Palestine became in the following years an important supply base of the Allied Forces in the Middle East and an important military arsenal. The Jewish units rendered signal service in the Middle East campaigns, and so did the Transjordan Frontier Force, which was a permanent part of the defence established in Transjordan and composed partly of Arabs, partly of Sudanese and other native peoples under British officers. In 1941 the Administration passed a Volunteer Defence Force Ordinance which provided for the enrolment of Palestinians as well as British subjects for the defence of the country. In 1942 it agreed to the formation of a special Palestinian regiment of combatant troops. Jews and Arabs were included in the regiment, but formed in separate companies.

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[1] The other Pacific islands which had been under a Japanese mandate were also involved in warlike operations. The conditions of the mandate with regard to them had not been observed by Japan for years before the outbreak of the war, and the failure of the Council of the League to investigate the allegations that the islands were being turned into military and naval bases was forcefully brought home.

Syria and the Lebanon were from the outbreak of war important French bases. The French authorities, who had negotiated treaties as far back as 1936 for the creation of independent republics in place of the two mandated states, suspended any action calculated to give effect to the treaties. The administration was carried on by a small body of ministers who were, in fact, controlled by the French High Commissioner and the military authorities. France had a large army in the Levant states, estimated at some 200,000 men, which included native levies. The collapse of France produced a very grave situation in Syria. At first the High Commissioner for the Mandated Territories, M. Puaux, in consultation with the French High Command, declared that France would continue the fight and would not surrender to the Axis Powers. When, however, General Weygand was sent by the Vichy Government to Syria, a sudden change of policy was announced. The civil and military authorities accepted the terms of the armistice, by which the forces in Syria were to be demobilized under the control of a Disarmament Commission of the Axis. Some high officers of the French Army and a number of the military and air force units made their way across the frontier into Palestine and joined the British forces. But the mass were compelled to accept the surrender of the military commanders. There was reason to fear that the French bases might be used as bases of the Axis; the danger was greatest in Syria, and was a matter of equal concern to Great Britain and Turkey. The British Government lost no time in making clear the action which it would take in certain circumstances to guard against that danger. On July 1st, following the declaration of General Mittelhauser, Commander-in-Chief of the French forces in the Levant, that hostilities had ceased in Syria, it issued the following declaration:

> "His Majesty's Government assume that this does not mean that if Germany or Italy sought to occupy Syria or the Lebanon, and were to try to do so in the face of British command of the sea, no attempt would be made by the French forces to oppose them. In order, however, to set at rest doubts which

> may be felt in any quarter, His Majesty's Government declare that they could not allow Syria or the Lebanon to be occupied by any hostile Power, or to be used as a base for attacks upon those countries in the Middle East which they are pledged to defend, or to become the scene of such disorder as to constitute a danger to those countries. They therefore hold themselves free to take whatever measures they may in such circumstances consider necessary in their own interests. Any action which they may hereafter be obliged to take in fulfilment of this declaration will be entirely without prejudice to the future status of the territories now under French mandate."

An Italian Disarmament Commission and, subsequently, a mixed German-Italian Commission were sent to Syria. When in 1941 a rising broke out in Iraq, and the Axis Powers were preparing for general hostilities in the Middle East, the German authorities, without any effective French opposition, used the Syrian aerodromes as bases and began to tighten their hold on the communications and strategic positions in the country. It was apparent that they intended to take control of the country as a base. The British commanders in the Middle East then took action. In May the British air forces bombed the aerodromes at Palmyra, Rayak, Beyrouth and Damascus. That drew a protest from the French High Commissioner, and the British Consul-General and his staff were obliged to leave Beyrouth, while the French consular staff left Jerusalem. In June British troops, accompanied by a Free French contingent, entered Syria. The French forces resisted, and for a month there was stiff fighting.

At the outset the British Government, together with General Catroux, representing General de Gaulle, issued a declaration that they would grant liberty and independence to Syria and the Lebanon, and negotiate a treaty with the governments of those countries to assure that object. The British Government added: "Should you support and join the Allies, His Majesty's Government offer you all the advantages enjoyed by the free countries which are associated with them. The blockade would be lifted, and you may enter into immediate relations with the Sterling Block which will give you advantages for your exports and imports. You will be able to sell your products and buy freely in all the free countries." By the beginning of July French resistance was broken, and there were pourparlers for an armistice. The German forces in Syria and the Italian members of the Armistice Commission and their consuls left the country, while the French warships were removed to Alexandretta, which was regarded as a neutral port. A purely military armistice was signed at Acre between the French and the British military forces. The Vichy Government declined to give its direct approval, but authorized General Dentz to act as he thought best.

On the occupation of Beyrouth, General Catroux was named delegate-plenipotentiary and Commander-in-Chief of the Free French in the Levant, and assumed all the powers of the High Commissioner. He took over many of the former officials. The British Government associated itself with the administration by the appointment of a diplomatic minister who, in fact, shared the control. The General declared that he would bring into being as quickly as possible legislative assemblies, and would negotiate fresh treaties on the lines of the treaties of alliance concluded by the French Republic in 1936. His declaration ended: "I will take steps to transmit to the League of Nations at the appropriate moment suggestions substituting the mandate régime by a new régime which will conform to the ends for which the mandate was devised." The British Minister of State in Cairo sent a letter to General de Gaulle affirming Great Britain's approval of these arrangements; but more than a year passed before any steps could be taken to implement them fully. A proclamation issued in September 1941 declared the new status of independent republics with the prerogatives of independent sovereign states and the right to nominate diplomatic representatives in a country where Syria had a special interest involved, e.g., Iraq, and to raise military forces.

However, the proclamation included a reservation that, during the war, policy must conform to the requirements of the Allies, and that the Allied commanders could dispose of the harbours, aerodromes, etc., in the countries concerned. Nothing was said about the relation of Syria to the other Arab states. In the meantime the economic linking up with other Middle Eastern countries under Allied control was effected. In a message sent at that time Mr. Churchill said: "We have no ambitions in Syria, and we do not intend to replace or supplant the French or to substitute British for French interests. Our policy is that Syria shall be handed back to the Syrians, who will assume at the earliest possible moment their independent sovereign rights." There was considerable political unrest in the country during 1942, because of the delay in introducing representative institutions. The government was, in fact, carried on during that year by a few ministers, nominated by the Free French administration, with the approval of the British representative. It was not until March 1943 that General Catroux proclaimed the intention to restore the constitution and to hold elections for representative chambers. The United States Government appointed a Consul-General in the Lebanon who, when presenting his credentials, emphasized that President Roosevelt wished by the appointment to manifest the sympathy of his Government with the aspirations of the Lebanese people for independence. The exercise of full powers was suspended by the limitations of war conditions, but the President looked forward to "the time when the Lebanese people would undertake the rights and responsibilities of full independent statehood".[1]

"B" and "C" Mandates

The reports (unpublished) on Togoland, the Cameroons and Tanganyika, which were under British mandate, for 1939–41, indicate the steadily increasing integration of the territories in the war effort. A special difficulty arose from the presence of a considerable number of German planters, business houses and missionaries in these former German colonies. While in the early stages of the war internment was restricted to those who were suspect, as the war spread and the position in Africa became more serious, it was found necessary to remove most of the German male inhabitants, and to take control through a custodian of enemy property of the estates and business owned by them. It was found necessary also to introduce legislation for compulsory service, which, however, was made to apply only to British subjects and not to the natives.

The Ordinances of the colony of Nigeria concerning special war measures, except the naval defence ordinance, were applied in the Cameroons. For the defence of the territory a special force of police, replaced later by a force of the Nigerian regiment, was drafted. Sea-going and river craft belonging to German planters, as well as aircraft, were seized as prize at the outbreak of hostilities. The German members of the Basel and Baptist missions were permitted to continue their activities on parole—probably having regard to the provisions of Article 7 of the Mandate relating to missionary activities. When later many of them were interned, the American Baptist Missionary Society came to the aid of the missions. The report on the Cameroons for 1940 is mainly confined to statistical tables, relating to financial, economic, and social questions.

The measures in the vast mandated territory of Tanganyika were more systematic. There the German resident population was about equal to the British resident population, and serious problems of internal security had to be met. Already at the crisis of September 1938, the necessity for preparing complete

[1] This note was written before the events in the Lebanon of the winter of 1943.

defence plans had been recognized. The defence of the territory was secured by a force of the King's African Rifles and the Naval Volunteer Force and the enrolment of special constables from the British residents. A Custodian of Enemy Property, and Information Office for the purpose of giving the native peoples news of the war, and a voluntary service register were instituted. In May 1939 a man-power commission was appointed. On the declaration of war these departments came into immediate working, and volunteering for labour service was organized amongst the natives. At first only a maximum of 10 per cent. of the adult males was accepted. No attempt was necessary to encourage recruiting. Many Africans enlisted in the Naval Volunteer Force, and were soon transformed into able seamen.

A central internment camp was set up for Germans of military age, and some hundreds of German refugees in the country were interned for a time, until a commission on aliens could make a sifting. In the end five hundred Germans were marked for compulsory repatriation; about two hundred, found to be the victims of Nazi oppression, were released. The wives and husbands of the interned Germans were left on the farms, and provision was made for their maintenance, when necessary. The Custodian of Enemy Property took over plantations and businesses owned by the Germans, and carried on those which could be profitably worked.

The one "C" Mandate for which a full report is available, for 1940, is New Guinea. At the outbreak of war the Defence Act of the Australian Commonwealth was extended to the territory, and the organization of volunteers to assist the local defence was taken in hand. It was restricted, however, to British subjects. Under the National Security Act of the Commonwealth, which was extended to the territory, a number of enemy aliens were detained and removed to Australia for safe custody.

NORMAN BENTWICH.

THE COMBINED RAW MATERIALS BOARD

THE supply side of the United Nations war organization was established on a combined basis in the first six months of 1942 by the setting up of five Combined Boards grouped round the Combined Chiefs of Staff. On January 26, 1942, President Roosevelt and Mr. Churchill announced in a joint statement the establishment by them by virtue of their war powers of the first three Combined Boards (Raw Materials, Munitions Assignment, and Shipping Adjustment). The other two (Production and Resources, and Food) were set up in the same way on 9th June.[1]

The announcement of 26th January devotes four brief paragraphs to the C.R.M.B. It begins by saying that in order to secure "a planned and expeditious utilization of the raw material resources of the United Nations . . . we hereby create the Combined Raw Materials Board", and continues:

"This Board will:

(*a*) Be composed of a representative of the British Government and a representative of the United States Government. The British member will represent and act under the instruction of the Minister of Supply. The Board shall have power to appoint the staff necessary to carry out its responsibilities.

(*b*) Plan the best and speediest development, expansion and use of the raw material resources, under the jurisdiction or control of the two Governments, and make the recommendations necessary to execute such plans. Such recommendations shall be carried out by all parts of the respective Governments.

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[1] Cmd. 6332, January 1942; State Dept. Bull., vol 6, No. 136, Jan. 31, 1942, and vol. 6, No. 155, June 13, 1942. See also S. D. Bull., vol. 8, No. 186 of 16 January 1943, which lists many joint war organizations. The principal source of this note is the first annual report of the Board published on 28 February 1943 (referred to herein as A.R.).

(c) In collaboration with others of the United Nations work toward the best utilization of their raw material resources, and, in collaboration with the interested nation or nations, formulate plans and recommendations for the development, expansion, purchase, or other effective use of their raw materials."

The word "combined", now applied not only to the Boards but to a number of other joint war bodies established since January 1942, gives the clue to the essential character of the C.R.M.B. "We use the term 'Combined' ", Mr. Oliver Lyttelton explained to the House of Commons on 24th June 1942, "to relate to any body representative of both American and British interests." Neither of the two members of the Board, nor the Board's staff, are international officials. The British member, as the text says, is "a representative of the British Government". The American member (Mr. William L. Batt) is Vice-Chairman of the War Production Board.

The combined principle runs right through the organization of the Board. The Board under paragraph (*a*) has "power to appoint the staff". But the members of the staff, though officers of the Board, are at the same time American or British officials with salaries paid by their respective Ministry or Agency. There is no separate item for the Board in either national budget, and the Board as such does not possess or expend funds.

The fully international civil service which was the characteristic of the League of Nations organization is lacking. But just as the national officials representing their countries on League technical committees and conferences developed an international sense, so national officials on the Board's staff develop a "combined" attitude. Without ceasing to be good national officials they develop the habit of acting and thinking in the common interest of the United Nations which the Board serves.

The Board is essentially a piece of machinery for getting the governmental agencies on both sides to co-ordinate their action on the basis of an agreed view of the facts. As Sir Clive Baillieu said in a broadcast in Washington in July 1943, "We worked out a method of gearing the two administrations together at every operational level, so that when a problem finally got to a meeting of the Board it had behind it agreement on the essential points right back down the line. The mainspring of this standing machinery for maintaining regular contact with all the principal departments concerned with the use or the production and distribution of raw materials, is the Advisory Operating Committee of the Board on which these agencies are represented.[1] This Committee prepares in advance the agreements which finally emerge in the recommendations of the Board. Recommendations are followed up by the Committee to see how they are being carried out. Through this Committee we have direct links with the other United Nations. This organization works smoothly and, in fact, most day-to-day problems are solved by informal agreement."

By its studies and "comprehensive formal reports" the Board has been able in respect of a critical material to provide "for the first time, through combined machinery not previously in existence, an official assessment of the total position"

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[1] The Operating Committee is composed of the Board's Executive Secretaries and representatives *on the U.S.A. side* of the State Department, War Production Board, Department of Commerce, Office of Foreign Economic Administration (Economic Warfare and Lend-Lease); and *on the U.K. side* of the Foreign Office, Ministry of Production, Ministry of Supply, Ministry of Economic Warfare (through Officers in each case of the British Raw Materials Mission and British Embassy).

(A.R.). This authoritative picture of the world demand and supply position—kept up to date and made subject to a progress report procedure—provides a firm basis for combined action by the governments. Such reports, and recommendations based on them, were made during the first year of the Board on thirty strategic materials (e.g., copper, rubber, mica, etc.), all of them commodities for which supply was sufficiently short to endanger some part of the war effort. Less detailed surveys were made of a large number of other materials.

Recommendations may cover (*a*) allocation by the Board; (*b*) steps to maintain or develop supply; (*c*) conservation; (*d*) co-ordination of development and of purchasing in the various markets of the world; (*e*) transport adjustments. Amongst the guiding principles followed have been the making of adjustments with a minimum disturbance of existing supply arrangements and the utmost economy in shipping, especially avoidance of the waste and risk of double shipping.

The exorbitant demands of war and the cutting off of the main supplies of some of the principal materials by enemy action have called for much attention to the problem of intensifying production from existing sources and of developing new sources. Conservation measures have been hardly less important, and this has called for a constant exchange of technical information (including specifications, metallurgical formulae, standardization, etc.) between the two countries to ensure that they follow "common standards of use", make proper use of scrap, inferior grades and interchangeable materials.

Since unregulated competition in the markets of the world for limited supplies would have seriously impeded the whole supply position of the United Nations, it has been necessary to co-ordinate purchasing. A considerable number of agreements to this end, covering most of the materials where there has been a joint problem, have been made under the auspices of the Board by the United States and Britain with each other, and with others of the United Nations or neutral powers.

Command of the seas, and of the air over the seas, in most parts of the world enables the United Nations to comb the world for the raw materials needed to defeat the enemy. The scope of the Board's work has not merely been the raw materials of the members of the British Commonwealth and the United States, but the whole non-Axis world. "Collaboration with others of the United Nations" is enjoined by the Board's terms of reference (para. 2). Full use of the raw material supplies of the United Nations or of friendly neutrals and satisfaction of their needs have been secured through the use of various machinery such as direct discussion and negotiation with representatives of the countries in Washington, or use of the channels of the State Department or of the Foreign Economic Administration, or through the Empire supply organization in London on which each British Commonwealth country is represented (The Commonwealth Supply Council). Canada comes in with the U.S.A. through the joint U.S.-Canadian Materials Co-ordinating Committee which was in existence before the C.R.M.B. was set up. Russian requirements for raw materials are covered in part by Protocol Agreements, the amounts being provided for in allocations by the Board, whilst the Board has taken into account in its allocations certain raw materials supplied by the U.S.S.R. Supplies from the Western Hemisphere—Central and South America—and the requirements of this area, are normally the responsibility of the U.S.A. The U.S.A. and Britain have acted jointly in negotiations regarding the supply and requirements of French, Belgian, and Portuguese territories in Africa.

The Board is part of a highly complex war organization—including the national raw material controls, the national controls over imports and exports, the shipping controls, the parallel Combined Boards, the Combined Chiefs of Staff—all parts of which must intermesh to produce a result in any one field. Other contributing factors of great importance have been the large raw material resources controlled by the United States and the British Commonwealth within their own territories, and the magnitude of their purchasing power and their mercantile marines, when as in this case they are firmly resolved to work together in close partnership. A further factor affecting the work of the Board is the agreement at the United Nations Conference at Atlantic City in November 1943 that the United Nations Relief and Rehabilitation Administration will present before "the inter-governmental allocating agencies" the overall requirements for relief and rehabilitation of the areas liberated or to be liberated.

In conclusion it can be said that the United Nations have not gone seriously short of any raw material for essential war purposes, and that the Board's machinery has worked to produce international agreements that have been observed by the parties and not varied by unilateral action. The Board's charter (para. *b*) lays down in far-reaching terms that its recommendations, though in the form of recommendations, "shall be carried out by all parts of the respective governments" (i.e. Britain and the U.S.A.), and the record has not belied these words.

H. DUNCAN HALL.

STATELESSNESS THROUGH THE PEACE TREATIES AFTER THE FIRST WORLD-WAR

ONE of the declared objects of those who drafted the treaties of peace at the end of the world-war 1914–18, was to get rid of the condition of statelessness. They failed signally in that object. Among the unexpected effects of the treaties was to multiply the class of the stateless far beyond anything that had occurred before. While the minority clauses, which were included in the treaties made with a number of the new nation-states, prescribed equal citizen rights for all citizens, without distinction of race or creed, many inhabitants of those countries were left without citizenship. The main cause of the trouble was that the principle hitherto adopted for determining nationality when there was a succession of states, namely, domicile or habitual residence in the territory transferred—which was maintained in the Treaty of Versailles with Germany—was modified by a new test. Nor was there any consistency in the provisions made with the succession states or with the old states from which territory was severed. The new criterion which was adopted in some of them, "Heimatsrecht" (in English, Right of Settlement), was inexact and indefinite, and, as it turned out in fact, hedged with all sorts of restrictions. And while the acknowledged principle in the treaties was that every person in the transferred territory should have a definite nationality, the letter of the provisions allowed for the denial of nationality to large classes. The rulers of the new states were anxious to restrict the rights of certain groups of the inhabitants who had been transferred; and so they took advantage of the indefinite terminology to render stateless those who could not comply exactly with the letter of the law. The subject engaged the attention of governments unceasingly during the period between the two wars, and led to the holding of many conferences. But the general will to get rid of the evil of statelessness was not present; and the conferences and conventions were in large measure abortive.

The successor states resented the conditions of the minority treaties which required them both to give equal citizenship to the members of minority nations and creeds, and to accord them special rights for their cultural life. In order, therefore, to evade what they regarded as an unfair burden, they found ways in their nationality laws of limiting full citizenship and of placing difficulties in the way of acquisition of nationality by the unwanted members of minorities.

The Treaty of St. Germain between the Allied nations and Austria, and the Treaty of Trianon between the Allied nations and Hungary, provided as follows about Austrian-Hungarian nationals: Austria (Hungary) shall recognize as Austrian (Hungarian) subjects as of right and without any formality all persons who have Heimatsrecht (*indigénat*) on Austrian (Hungarian) territory on the date of the coming into force of the treaty, and who are not subjects of another nationality, and also every person born on Austrian (Hungarian) territory who cannot claim by reason of his birth any other nationality. Further, every person who had his Heimat in territory formerly part of the Austro-Hungarian Empire will acquire absolutely the nationality of the State exercising sovereignty over that territory. The principle of Heimatsrecht led to the formation of the new and growing class of "Heimatlose", persons homeless in the legal sense, who were also "Staatenlose", people without a State. This criterion of Heimat was introduced into the Treaty of St. Germain at the express request of the Austrian delegates; and was accepted in good faith by the representatives of the Allied nations as being clearer and more certain than domicile or habitual residence. It had never before been the basis of nationality in international treaties; it is difficult to find for it a correct translation into English. The legal term which most nearly corresponds with it is the "right of settlement" under the old English Poor Law, by which a person was chargeable for maintenance on a particular local authority if he had his origin in that community or had resided there for a certain period. The Austrian concept, like the English, was derived from the administration of the Poor Law. The Heimat was the community responsible for the maintenance of its members in destitution, and it was acquired on birth from the parent. It remained, like domicile, inherent in the person, even though he moved his ordinary residence. But that condition was modified by laws which provided for the acquisition of a fresh Heimatsrecht after ten years of residence, and for the discarding of the obligation by the original community if the person had been away from it for ten years.

The connection of the Heimatsrecht with nationality occurred in an Austrian law of 1862 which provided that every Staatsbuerger (state national) must be in possession of the Heimatsrecht in a community. "The conditions of that right will be determined by a special law." The conditions are laid down in the special law of 1863 as follows: "The right of Heimat is acquired by (1) origin, (2) marriage (for women), (3) the appointment to a Government post, (4) voluntary acceptance into a 'Heimatsverband' (Settlement-group). It is further laid down that (*a*) loss of Austrian nationality involves the loss of Heimat, (*b*) a person losing nationality in consequence of peace treaties, and failing to acquire another nationality, re-acquires the right of Heimat which he possessed before losing his nationality, and (*c*) the right of Heimat in one commune ceases through its acquisition in another."

The trouble about the Heimat was that it was designed for a static population. When, in the industrial age, the movement of workers became common, the Heimat, which was attached to a person on birth, became in innumerable cases fictitious; and it was necessary to amend the law so as to allow the more easy acquisition of a fresh attachment for the purpose of maintenance in case of destitution. That was done by a Heimatsgesetz-Novelle of 1896, which provided that a community must accept all Austrian nationals who had resided of their own free will uninterruptedly for ten years in that community without having become a charge on the poor relief during that time. The acquiring community was bound to inform the former Heimat of its acceptance; but the right was acquired only on application both for acceptance in the new and discharge from the old community. Moreover, the condition of ten years of unbroken residence gave rise to legal conflict between the original and the acquiring communities. In the Austro-Hungarian Empire those conflicts were resolved by a Supreme Administrative Court of Justice in Vienna. The number of cases submitted to the tribunal was steadily increasing up to the conclusion of the peace treaties. It was natural that a right which placed a financial obligation on a local community would be resisted by all possible devices; and, therefore, large numbers were left in suspense between the old and new Heimat. Moreover, many persons who had no reason to expect that they would be a charge on the community took no steps to obtain a Heimat when they moved from their original home. For example, persons in the liberal professions, families of retired officers and the intellectuals in general, attached no importance to the acquisition of such a right and, therefore, were technically Heimatlose. It had not entered their minds, before the peace treaties were devised, that they were endangering their right of citizenship.

The Hungarian law about membership of a Commune was enacted in 1886, and was, therefore, more modern in its character, and made more definite provision for change than the Austrian law regarding Heimatsrecht. It provided that membership of the community was acquired (*a*) through origin, (*b*) through marriage (for women), and (*c*) automatically by time. The last provision in detail prescribed that a Heimat holder leaving one community and settling in another, and having resided for four years uninterruptedly in the new community and subscribed to the communal rates during that period, without having committed any act of moral turpitude, will be regarded as a member of that community and as having lost the membership of his former Heimat, even if he did not notify his intention to settle in the new community. The Supreme Administrative Court interpreted the conditions adequate for the acquisition of a new community as (1) payment on at least one occasion during the four years of the communal rates, (2) any service rendered for the communal needs and purposes. And it confirmed that the fulfilment of these conditions gave automatically the right of membership without any further formality.

Unfortunately, however, when it came to the application of the provisions of the peace treaties in an unwilling State, either successor State or the truncated Hungary, these relatively liberal provisions and interpretations were not binding. A further flaw in the Hungarian law was that it contained no provision by which Hungarian officials acquired the right of Heimat in the community in which they exercised their function. Whereas in Austria the nationality had been bound up to some extent with the right of Heimat, in Hungary the law of communal membership applied only to the question of poor relief. In fact, the law was not thoroughly applied, so that, except in Budapest and other large cities, lists were not kept of the members of the communities. The position was similar in the Croatian and Slovenian parts of the Austro-Hungarian Empire, where Heimatsrecht was of importance only in questions of poor relief. In Bosnia and Herzegovina the principle was not introduced till after the annexation in 1909.

Before the peace treaties the absence of Heimatsrecht did not involve serious consequences because it did not affect the Austro-Hungarian nationality. There was no connection between heimatlos and staatenlos. The attempt to make nationality dependent on the possession of Heimatsrecht affected fifty-two millions.

A further complication was introduced by provisions in the treaties regarding the Italian Tyrol, Czechoslovakia, and Yugoslavia, the territories which were cut off from the Austro-Hungarian Empire. Heimatsrecht was only valid, and the nationality based on it was only acquired, if it were possessed for the Tyrol before May 1915, and in the territories transferred to Czecholslovakia and Yugoslavia before January 1910. Where it was acquired in these territories after the specified dates, it did not give the right of nationality, so that, apart from naturalization, the only course open for acquiring nationality was re-acquisition of original Heimatsrecht from birth (re-integration). While the peace treaties prescribed re-integration in default of another Heimat, the actual position of such persons was too often precarious because of inability to establish the previous Heimat. The State to which such a person was thrown back for his nationality was normally unwilling to accept him, seeing that he was no longer domiciled there; and the unwillingness of the states directly affected or of the other states on the Council of the League to force the issue by appeal to the International Court of Justice defeated the intention.

Statelessness Resulting from New Nationality Laws

The uncertain criterion of nationality adopted in the treaties with Austria and Hungary and the Successor states was made still more unsatisfactory by the nationality laws passed in these states. In many particulars they were not in agreement with the provisions of the peace treaties; and in general they were influenced by an attempt of the states to restrict their nationality to the subjects of the old kingdom and of the majority race, and to deny it to members of minorities. In that way they could evade in part the provisions of the minority treaties which were imposed on them and resented. So the acquisition of nationality in the Italian Tyrol, Czechoslovakia, Yugoslavia and Rumania, which received territories secured from the old Austro-Hungarian Empire, was made dependent in certain cases on the authorization of the State. The worst offender in this respect was the Rumanian State, where the departure from the provisions of the Rumanian minorities treaty was intentional. Sir Walter Napier, who, on behalf of the International Federation of the League of Nations Societies, laboured for years to find a solution of the problems of statelessness from which the minorities in Central Europe suffered, wrote in a report in 1927: "I feel little doubt that, if the reasons put forward by the Rumanian memorandum were considered by the Permanent Court of International Justice, they would be rejected". The Rumanian nationality law of February 1924 was really a challenge to the effective existence of the minorities treaty; and the challenge was not taken up because the Powers were unwilling to have the matter effectively discussed by the Council of the League or submitted to the Court.

At the meeting of the Federation at Brussels in 1928, Sir Walter Napier proposed that the Permanent Court of International Justice should give an advisory opinion on the question whether legislation of the states, signatories of Minority treaties, was in conformity with the nationality provisions of those treaties. But the resolution was not adopted. The Successor states were themselves anxious to avoid reference to the Permanent Court of International Justice. In the treaty between Austria and Czechoslovakia at Bruenn, referred to below, it was provided that the states should not exercise the right of recourse to the Permanent Court which was conferred in the minorities treaties. That provision was, indeed, impugned in the Council of the League, where it was said that repudiation could obviously not affect the stipulations contained in the treaty of St. Germain with Austria and Czecholsovakia. Nevertheless, the jurisdiction of the International Court was not, in fact, invoked.

Moreover, in the little republics of Austria and Hungary a like unwillingness to accord their nationality to minority groups led to a denial of the right of option to large numbers of Jews who were in origin from Galicia, now part of Poland, to reside in Vienna or Budapest. Besides the desire to evade the obligations of the minority treaties, the framers of the nationality laws were moved by a desire to avoid the complication of double nationality which they apparently regarded as more serious than statelessness.

In the decade after the signing of the peace treaties numerous attempts were made by the states of Central Europe to find a way out of the confusion which was brought about by:

(*a*) the treatment of the peace treaties;

(*b*) the nationality laws of the separate states;
(*c*) the minorities treaties with succession states.

A Convention made between Austria and Czechoslovakia at Bruenn in 1920 dealt with the possession of Heimatsrecht by public officials in the two states, and provided for a mixed commission to deal with nationality conflicts which might arise between the two states. One of the articles stated that the two states mutually recognized the Heimatsrecht acquired in either by public officials as a basis for the nationality of such persons. Such nationality would be acquired by definite appointment to a State institution or in some State undertaking. Further, public officials employed in the foreign service of either of the states, whose official residences are outside the State, should be recognized as nationals. The same rule applied to persons who, at the date of the treaty with Austria, were engaged in the Forces as privates or N.C.O.s. Another article set out the presumption of law in favour of nationality derived from the place of birth, where the other provisions relating to nationality were not adequate to establish the national status of a former member of the Austrian State. This convention, which was ratified and acted on, was relatively effective in disposing of the statelessness of a number of persons. Another corrective convention, made between Germany and Poland at Vienna in 1924, dealt with the criterion of habitual residence, that was adopted in the Treaty of Versailles, and was more definite than the criterion of Heimat. A convention made by Poland with Czechoslovakia, concerning the Silesian territories, prescribed that, where questions of nationality are not settled by the principle of Heimat, the national status would be determined in accordance with the provisions of the treaties of peace. That convention recognized habitual residence as an alternative basis to Heimat.

The most important convention regarding double nationality and statelessness was signed at Rome in 1922 by all the successor states of the Austro-Hungarian Empire: Austria, Hungary, Czechoslovakia, Italy, Poland, Rumania and Yugoslavia. The operative article prescribed that, in case of dispute as to the nationality to be attributed to a national of the former Austro-Hungarian Empire or the Kingdom of Hungary, a commission composed of a delegate of each of the parties interested and of a chairman elected by agreement or, in default of that, by the President of the Swiss Federation from a third state, was to decide the conflict. Unfortunately, however, the convention was not ratified by several of the signatory powers, and was, therefore, only a partial instrument in disposing of the conflicts.

It is unnecessary to set out in detail all the complications of the nationality laws. The effect was a global statelessness affecting hundreds of thousands of cases; and this problem was a running sore in the relations between the minorities and the succession states throughout the twenty years between the wars.

The Federation of the League of Nations Societies kept up a constant effort to secure some redress, and submitted resolutions annually to the Assembly and Council of the League of Nations from 1929 to 1933. But its efforts were in vain. The only positive step for which it could take any credit was the resolution in general terms of the conference for the codification of international law at The Hague in 1933, which called for the abolition of statelessness. Its specific proposal to the Council to convene a conference of all the states interested, with a view to the drawing up of a convention that would definitely regulate the question of statelessness, and its recommendation of a mixed tribunal for this purpose, were unheeded; and from 1933, when Germany left the League, the Powers were concerned with graver issues. They did something through the League to regulate the status of the mass of persons rendered stateless by the unilateral act of totalitarian states, first Russia, then Turkey, and then Germany. But they left the miserable conditions of tens of thousands, who lacked nationality because of flaws in the treaties, to be regulated as best they could by bilateral agreements and arbitration tribunals.

The lessons that may be derived from the confusion of the nationality provisions in the treaties made after the war of 1914–18 may be summarized as follows:

(1) The criterion of nationality in cases of State succession should be the established principle of habitual residence or domicile, and should operate automatically.

(2) The treaties should establish a further principle, which should apply in the absence of either of these two main criterions: e.g., ordinary residence at the time the issue is raised.

(3) Either a special international court should be constituted by the peace treaties to deal immediately with all questions of disputed nationality arising from state succession; or the Permanent Court of International Justice should be vested with jurisdiction in such matters. The avoidance of statelessness is an international and not simply a national concern, and, therefore, requires international judicial instruments to which the individual can, at need, have recourse.

NORMAN BENTWICH.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1943

Municipal legislation, however technical, on matters of nationality has often a direct bearing on general questions of nationality which are of interest for the international lawyer. This applies in many ways to the British Nationality and Status of Aliens Act, 1943.

Prior to the passing of British Nationality and Status of Aliens Act, 1943, a person born abroad could only acquire British nationality by reason of the registration of his birth at a Consulate, if the registration was effected either within one year, or, with the permission of the Secretary of State, two years after its occurrence. Further, persons born before the 1st January 1915 could not acquire British nationality by the registration of their births at a Consulate at all, and persons born between the 31st December 1914 and the 4th August 1922 (the date of the enactment of section 1 (1) (b) (v) of the Act of 1914 as amended in 1922), could only acquire it if they were of the second generation born abroad and were registered within twelve months of the 1st August 1922. By the new Act these limitations and restrictions are swept away and a great simplification in the law introduced.

While Section 1 (2) (a) of the new Act begins by providing for registration as of right within one year of the birth, paragraph (b) enables the Secretary of State to sanction registration after this period without any limitation of time. Consequently, the registration may be authorized under paragraph (b) whatever the age of the person concerned, and even when he is dead. It is, however, we suppose unlikely that the Secretary of State would authorize the registration of the birth of a person now dead unless such registration is necessary for the purpose of securing the British nationality of a wife or child of the deceased who are considered worthy of such nationality. There is probably no intention of going back unduly into the past. The effect of the section is to make the person a British subject as from the date of his birth. This is especially important if the person is, at the time his birth is registered, married and has children born abroad. The new paragraph (b) applies to any person, whether born before or after the commencement of the Act of 1943, provided that his father was a British subject at the date of his birth; consequently, persons born before 1915 can now, with the permission of the Secretary of State, be registered. Similarly, persons born between the 31st December 1914 and the 4th August 1922 can be registered notwithstanding that they are of the third generation born abroad.

The Secretary of State has power to direct that a registration made without his consent shall be deemed to have been made with his consent. We suppose that in the past some births have been erroneously registered of persons who were not entitled to be registered at the time the registrations were made, by reason of the above-mentioned restrictions under the law prior to the new Act. It is now possible for the Secretary of State to validate these registrations provided that the father was a British subject at the time of the birth, and this, of course, includes cases where the father may have acquired British nationality with retrospective effect for the time under the new Act. It was impossible satisfactorily to work the provisions of the law as they were prior to the new Act owing to the impossibility of bringing the requirements of registration to the knowledge of the parents within the time limits then allowed. As a result, children of perfectly loyal families have up to now not acquired British nationality. Amongst such children were many who have served or volunteered to serve in the British forces in the war, and it was predominantly this last factor which influenced the decision to make this amendment to the law in time of war.

The arrangements under which the children born abroad of British subjects can acquire British nationality by the registration of their births at a Consulate is one-half of a system which has been adopted in British nationality law and which may be described as "controlled *jus sanguinis*". The idea of this controlled *jus sanguinis* is that instead of allowing British nationality to be transmitted automatically from generation to generation in the case of British families resident abroad, British nationality should only so extend if the families were genuinely loyal and desired the status of British subjects. The fact that the parents (or as it may be now, the person concerned himself) apply for registration is evidence of this desire. On the other hand, in all cases where the consent of the Secretary of State is required, it seems to us probable that the Secretary of State will wish to satisfy himself that there is genuine loyalty and that the person concerned (or his family in the case of a child) is worthy of British nationality.

The effect of Section 2 of the new Act is that the child of a British father born in a British protectorate or mandated territory or in a country where at the time of birth His Majesty exercised exterritorial jurisdiction over British subjects (China, Egypt, &c.) is placed in exactly the same position from the point of view of his nationality and his capacity to transmit British nationality to his children as if he had been born on British soil. It would seem that the first proviso to Section 1 (1) of the Act of 1914 had intended to produce this result, but failed to do so through a drafting error. In anticipation of an amendment of the law with retrospective effect which this section has now made, persons who come under this provision have been in general treated as British subjects. Consequently, the effect of this section is likely to be simply a confirmation of the existing practice.

Section 3 provides with retrospective effect that the posthumous child of a British father is placed exactly in the position from the point of view of his British nationality as he would have been if his father had survived and remained a British subject till after the birth. This section, too, corrects an unintended result of the drafting of the 1914 Act.

Sections 4 and 5 are complementary. Under Section 4 His Majesty's Government in the United Kingdom take power to naturalize certain aliens, although the conditions of Part II of the Act of 1914 are not complied with. It is believed that Canada, New Zealand, and South Africa either have enacted or are intending to enact legislation under which they will also naturalize aliens on the ground of war service, although the conditions of Part II of the Act of 1914 are not complied with. In order that these persons so naturalized in the Dominions should be recognized as British subjects in the United Kingdom, Section 5 has been inserted in the present Act.

Section 6 re-enacts with amendments the second proviso to Section 1 (1) of the

Act of 1914. These provisions form the second half of the system of controlled *jus sanguinis,* which has been referred to above. Under the law prior to the present Act, the loyalty, and the desire to be British subjects, of persons of the second and subsequent generations born abroad was assured (*a*) by the fact that the parents voluntarily registered the birth, (*b*) by the fact that the person concerned during his twenty-second year (or later if the Secretary of State so permitted) made a declaration of retention of British nationality, and lost the British nationality if he did not choose to do so. This principle is retained in Section 6 of the new Act, but as persons whose nationality depends on registration can now, for the first time, have their births registered at a Consulate when they are already over twenty-one years of age, Section 6 absolves from the requirement of making a declaration of retention any person who was over one when his birth was registered.

The second change introduced by Section 6 is contained in sub-sections (2) and (3), which excuse from the necessity of making a declaration of retention any person who has served in His Majesty's forces during the present war and any person with respect to whom the Secretary of State is satisfied that the only reason why he did not serve in the forces is that he was engaged on work of national importance or was otherwise unavoidably prevented from doing so. The third change introduced by Section 6 is the abolition of the requirement that a person who has another nationality in addition to British must divest himself of that other nationality when he is making his declaration of retention, if under the law of the other country of which he is also a national he is able to do so.

Section 7 amends Section 14 of the Act of 1914 by providing:

(*a*) that declarations of alienage are not valid until they have been registered at the Home Office (though the previous regulations provided for the registration of declarations of alienage, it was not clear that a declaration was not valid until registered);

(*b*) that in war-time the Secretary of State may, at his discretion, refuse the registration of a declaration of alienage. The position in war-time, prior to this Act, as regard declarations of alienage was (i) that there were judicial decisions that a declaration of alienage was invalid if made by a person who possessed the nationality of an enemy Power as well as British nationality, and (ii) that it was uncertain whether the principles of that decision also rendered invalid declarations when the other nationality was that of a neutral or Allied State, though in practice declarations in these cases were accepted and treated as valid in the absence of a judicial decision to the contrary. It was apparently felt undesirable that in time of war a British subject should have an unfettered right to discard the obligations of his allegiance by making a declaration of alienage. Canada and New Zealand have already legislated, prohibiting so far as they are concerned declarations of alienage in war-time.

Section 8 (b) must be read with Section 9. These two provisions make it possible for births and deaths of British subjects abroad to be registered at the consulates of the Protecting Power in those countries where His Majesty's interests are in the hands of the representatives of the Protecting Power. Where births are registered at a consulate of the Protecting Power, the registration has the same effect for nationality purposes as a registration at a British consulate. It also provides for registration in the Foreign Office of such birth, a course which may be convenient where the parents have been repatriated to this country.

The object of paragraph (c) of Section 8 is to provide that, where something is done or permitted by a Dominion authority acting under provision of a British nationality statute of the Dominion corresponding to a provision of the British Nationality and Status of Aliens Acts of the United Kingdom, which requires it to be done by or with the permission of a Secretary of State, the Act or permission of Dominion authority will have the same effect in the United Kingdom as if it had been done by or with the permission of the Secretary of State. This provision confirms what is believed to be the existing practice of the Departments of His Majesty's Government in the United Kingdom and ensures that the courts, if a case involving the point came before them, would take the same view.

The new expression "Consulate of His Majesty", which takes the place of the words "British Consulates" and which is defined in Section 10 (1), is adopted because there are now Consulate of Dominions in foreign countries, which was not the case when the Act of 1914 was passed.

DECISIONS OF THE ENGLISH COURTS DURING THE YEARS 1939–42

Involving Points of Public or Private International Law

NOTE: In general, all relevant cases reported in the English Law Reports for 1939–42 and up to June 1943 are reviewed in this number of the *Year Book.* For special reasons one Scottish case and one Canadian case are included. Two important classes of cases are excluded, namely:

(1) Prize cases, since these will form the subject of a separate article in the next issue of the *Year Book.*

(2) Cases dealing with Trading with the Enemy (by statute or by Common Law) including the position of enemy aliens as litigants before the English courts. These cases can also most suitably be treated as a separate class. See below, p. 222.

In this number of the *Year Book* we have to cover, in reviewing the cases, a period of four years, including both peacetime and wartime. It is not possible to separate cases dealing with points of Public and Private International Law respectively into two clear divisions, but in our arrangement we begin with those which are obviously "Public" and shade off through a middle region into those which are obviously "Private".

Section I

We begin with the last of the Spanish Civil War cases which deal principally with the Immunity of a Foreign Sovereign from process and the effect of a requisition by a Foreign Sovereign of a vessel flying his flag lying in a British port (*Arantzazu Mendi: Abodi Mendi: The Government of The Republic of Spain* v. *The National Bank of Scotland*).

From these we pass to cases dealing with the position of exiled Allied Governments, carrying on their functions on British soil, and the right of these Governments by legislation to affect the ownership or possession of property situated in the United Kingdom and belonging to their nationals and to conscript their nationals in the United Kingdom for military service. (*Lorentzen* v *Lydden: In re Amand*).

The last of these cases rendered necessary some discussion of the English remedy of "Habeas Corpus" and in that connexion we refer shortly to a case where an attempt was made to obtain the release of a prisoner in the British municipality in the Chinese city of Tientsin by "Habeas Corpus" in the English courts.

This section of our survey concludes with two (Spanish) cases dealing with the legal distinction beteen a Foreign State and a Foreign Government (*Government of Spain* v. *Chancery Lane Safe Deposit* and *The State of Spain* v. *Chancery Lane Safe Deposit*).

Case No. 1. The first case is *The Arantzazu Mendi* ([1939] A.C. 256), in which the House of Lords confirmed the decision of the Court of Appeal and of Bucknill J., which was fully discussed in the 1939 volume (page 150). It is in consequence only necessary to say here that, whereas the case of *The Cristina* (1938 volume, page 243) had decided that proceedings *in rem* against a ship in the possession of the Spanish Republican Government (then *de facto* Government of part of Spain only but recognized as *de jure* Government of the whole of Spain) must be discharged as violating the immunity of a foreign sovereign State because such proceedings endeavoured to make a foreign sovereign party to legal proceedings against his will and also attempted to seize and detain by legal process property of which a foreign sovereign was in possession, in the *Arantzazu Mendi*, the ship was in the possession of General Franco's Government, which was then recognized by His Majesty's Government as "a Government in conflict with the Republican Government, claiming to be the Government of Spain and seeking to overthrow the Republican Government and establish its own authority over the whole of Spain, a Government which was not subordinate to any other Government in Spain" and was recognized as "the Government which exercised *de facto* administrative control over the greater portion of Spain, but had no other recognition accorded to it". The question was whether General Franco's Government could claim in the English courts the same immunity from process. It was argued that it could not, because the recognition indicated in the letter from the Foreign Secretary only amounted to recognition as an insurgent authority, and an insurgent authority could not claim immunity as a foreign sovereign State. The House of Lords, however, like the courts below, rejected this argument, and Lord Atkin said, "By 'exercising *de facto* administrative control' or 'exercising effective administrative control' I understand exercising all the functions of a sovereign Government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws, regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels, whether warships or merchant ships. In these circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory, while not subordinate to any other Government in that territory, is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign State."

As stated in the 1938 and 1939 volumes, the question of immunity had, both in the *Cristina* and in the *Arantzazu Mendi* cases, and indeed in all the other Spanish ship cases up till that time, prevented the decision of an interesting question, namely whether, if a foreign Government requisitioned a ship flying its flag when that ship was in a British port, the English courts would recognize that requisition as giving the foreign Government a title to possession of the vessel. Immunity prevented the title to the possession being adjudicated upon.

In the 1938 volume of this *Year Book* (p. 245) it was recorded that in the *Cristina* case it was argued (but not decided) that the action of the Spanish Government through its consuls in taking possession of Spanish ships in the United Kingdom against the will of their owners and thus enforcing their requisition was a violation of the territorial sovereignty of the United Kingdom. It was there pointed out that it did not necessarily follow that this contention was correct, even if the requisition did not give a legal title to possession under English law, because consuls have many functions with regard to merchant shipping flying their flag, from which the authorities of the foreign territorial State disinterest themselves, provided that no breach of the peace or violation of the local law occurs. The local authorities as a rule neither interfere with nor assist the consuls in the discharge of these functions, and the position may be much the same as regards requisition effected by consular officers. In the ordinary way, the right and power of the consul to requisition the ship for his Government may depend on whether he can get his order obeyed willingly by the captain and crew of the ship. This position of the consuls and the attitude of the local authorities to requisitions effected through them is illustrated by the next case, which fell for determination between the decision of the Court of Appeal in the *Arantzazu Mendi* case and the decision of the House of Lords.

Case No. 2. *The Abodi Mendi* ([1939] P. 178). The Republican Spanish Government purported to requisition the *Abodi Mendi*, but their consul had been unable to obtain possession of the ship because of the attitude of the master, A., who favoured the Nationalist cause. On April 4th, 1938, the Spanish consul purported to appoint X., who had been Chief Officer, captain in place of A. Then on April 13th the Spanish Republican Government took proceedings *in rem* against the vessel and against Captain A., claiming possession, and the vessel was arrested by the Admiralty

Marshal. On April 22nd the owners and Captain A. entered an appearance and the Nationalist Government of Spain entered a conditional appearance, without prejudice to a later application to set aside the writ on the ground that they had requisitioned the vessel and were in possession of it through Captain A. The proceedings stood over by consent till October 4th, when the plaintiffs gave notice of discontinuance. On October 14th the Spanish Republican Government issued a summons, returnable on the 18th October, asking for removal of the warrant of arrest, and on the 15th the owners consented to the release of the vessel. However, between the 14th and 18th October Captain A. left the ship to go for a walk, and on his return he found that the crew had removed the gangway and refused to allow him to return. The owners then withdrew their assent to the release, and on the 20th October issued a summons asking for an order of the court for the reinstatement of Captain A., and the Nationalist Government appeared and supported this summons. (For the background of these cross claims, reference may be made to the account in the 1939 volume of the facts in the *Arantzazu Mendi* case.) Captain A. had appealed to the local police for assistance to return to his vessel, but such assistance had not been accorded to him. The President held that he could not order the reinstatement of the master without deciding whether the Republican Government or the owners had the right to the possession of the ship, and that meant deciding whether the Republican requisition was valid. Captain A. had been dismissed by the Republican Government before April 14th, when these proceedings were started. He therefore dismissed the summons by the owners for the reinstatement of Captain A. He then considered the plaintiffs' summons asking for the removal of the arrest, and held that there had been something perilously near an abuse of the process of the court by the Republican Government, seeing that they issued in April a writ *in rem* claiming that they should be awarded possession of the ship and implying therefore that someone else was in actual possession, whereas now they alleged that they had been in possession ever since April 4th. They had held up the ship by means of this writ till subsequent events could put them in effective control and they could plead immunity against claims by other parties. The plaintiffs were not entitled now to have the vessel released unless the court in the exercise of its discretion thought it right so to order, and in the circumstances the President decided to continue the arrest until the House of Lords had decided (in the *Arantzazu Mendi*) whether the Nationalist Government, who also claimed possession, could also claim immunity from process. The plaintiffs appealed, and it was held by the Court of Appeal that the forcible exclusion of Captain A. when the vessel was in the custody of the Admiralty Marshal was in effect a taking by the plaintiffs of the law into their own hands. The plaintiffs had admitted responsibility for this action, which was done to secure their effective control over the vessel. This action was in fact a contempt of court, and simply to allow the arrest to be raised would be to allow the plaintiffs to benefit from their contempt and in fact prevent the Nationalist Government from making their case that they had possession through Captain A. and could plead immunity. The shipowners were entitled to complain of this contempt in these proceedings, whether or not the Nationalist Government were entitled to do so. The Court of Appeal discharged both the orders made by the President and ordered that the vessel should be released when it was established that Captain A. had been reinstated on the ship and the status quo before the contempt restored. The court refused to order the Marshal to take steps with the assistance of the police to put Captain A. back.

The question, which immunity had always prevented the English courts from deciding, had come before the Scottish courts in 1939. The Court of Session had to decide whether the Republican Spanish Government had gained a legal title to possession of a ship, which it had requisitioned in a Scottish port, because this

Government sued as plaintiff, and claimed damages, on the ground that it had been deprived of the use of the requisitioned ship by proceedings *in rem* in the Scottish courts for a considerable time before these proceedings were abandoned.

Case No. 3.

The Government of the Republic of Spain v. *The National Bank of Scotland.*
Scottish Court of Session (Lord Jamieson Lord Ordinary and the 2nd Division on Appeal) 1939, S.C. 413.

The *El Condado* was a Spanish ship registered at Bilbao and belonging to a company also registered there. In July 1937 (during the Spanish civil war) she was in the port of Greenock. On the 3rd July the Spanish consul at Glasgow, acting on behalf of the Spanish Republican Government, requisitioned the vessel under a decree of this government issued at Barcelona on the 28th June, 1937, and applying to all ships registered at Bilbao. The consul dismissed the master and appointed a new master, L., who took over the vessel on the 10th July and thereafter held it on behalf of the Spanish Republican Government. At the time of the issue of the decree, this Government had lost control of Bilbao which, after the 19th June 1937, had come under the control of their opponents, the Spanish Nationalist Government: His Majesty's Government recognized the Spanish Republican Government as the *de jure* Government of the whole of Spain, but the Spanish Nationalist Government as the *de facto* Government of that part of Spain which they controlled.[1]

On the 13th July the company, which owned the vessel, bringing proceedings against Captain L., and claiming that L., and anyone acting for him, should be interdicted from sailing the ship from Greenock or interfering with her without leave of the owners, obtained from the Sheriff Substitute an interim interdict; but on the 24th July the owners were ordered to find a caution of £1,000 for any damage which might be caused by the interim interdict, if the owners were ultimately found to be wrong, and the owners furnished a bond by the defenders, the Bank. On the 5th October 1937 the pursuers, the Spanish Republican Government, entered a conditional appearance in the proceedings and pleaded that they were in the possession of the vessel by Captain L., their agent, and that the court had no jurisdiction to entertain an action of interdict against her, as they were the government of an independent foreign State and property in their ownership or possession was immune from the jurisdiction. On the 11th November 1937 the Sheriff Substitute upheld this contention and recalled the interim interdict, but on an appeal being entered to the Court of Session by the owners, the interim interdict was restored. The hearing of the appeal was delayed by consent pending the delivery of the House of Lords of their decision in the case of the *Cristina*,[2] in which the question of immunity fell for decision in almost identical circumstances. On the delivery of the decision of the House of Lords, the owners dropped their appeal, and the interim interdict was recalled and the action dismissed.

On the 18th June 1938 the pursuers, the Spanish Republican Government, began an action against the Bank under the bond, claiming damages for the loss sustained by them by the loss of use of their vessel as a result of the interim interdict.

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[1] These facts were shown by certificates from the Foreign Office which had been put in evidence in certain earlier cases before the English courts (*Banco de Bilbao* v. *Rey*: [1938] 2 K.B. 176; *B.Y.B.*, 1938. p, 241; *Arantzazu Mendi*, [1938] P. 233; *B.Y.B.*, 1939, p. 151) and the 2nd Division held that they could take judicial cognizance of these facts without requiring special certificates to be put in in the present action. In the *Banco de Bilbao* case the English court had held that the decrees of the Spanish Republican Government could not be regarded as being the law applicable to Bilbao, when such decrees were enacted after that government had ceased to control Bilbao.

[2] [1938] A.C. 485: *B.Y.B.*, 1939, p. 243.

The pursuers contended (*a*) that the dropping of the appeal and the decision in the *Cristina* showed that the interim interdict had been wrongly obtained and therefore on that ground alone they were entitled to damages for the loss of the use of the vessel, which was in their possession, caused by it; and in any case their title to possession could not be disputed in the court because they were a foreign sovereign government; (*b*) in the alternative (if it were necessary for them to prove their title to possession) that they became entitled to possession by virtue of the decree of the 28th June 1937.

The defenders contended (1) that, in order to recover damages for deprivation of their possession, the pursuers must prove that they were legally entitled to possession and suffered an invasion of their legal rights; having invoked the jurisdiction as pursuers they must prove their case and have submitted to the jurisdiction of the court for the decision of those issues necessary to prove their case; (2) that the interim interdict had been recalled merely on the grounds that the court had no jurisdiction, owing to the status of the pursuers, to determine whether their possession was lawful or not and this in no way showed that the plaintiffs were lawfully entitled to possession; (3) that the pursuers were not entitled to the possession of the vessel because a Spanish requisitioning decree could not give a title, which the court could recognize, to the possession of a vessel outside Spanish waters; (4) (as an alternative to 3) the Spanish Republican Government were not entitled to requisition Spanish ships registered at and belonging to companies registered at Bilbao, in virtue of a decree made after they had lost control of Bilbao. (The *Banco de Bilbao* decision was relied on here.)

The Lord Ordinary and all the members of the 2nd Division decided in favour of the defenders, accepting the arguments contained in points (1), (2) and (3) above. Lords Mackay and Wark also accepted the alternative contention (4), which is in accord with the *ratio decidendi* of the *Banco de Bilbao* case. If a Government can requisition ships which are outside its territory, that power must be confined to ships flying its flag and registered and owned in its territory. A ship registered and owned in a port not under the control of that Government, but under the control of another Government recognized *de facto*, cannot be regarded as being registered or owned in the territory of the requisitioning Government, notwithstanding that the latter may be the *de jure* Government of the territory. There is an *obiter dictum* of Bucknill J. in the *Arantzazu Mendi* case (see *B.Y.B.*, 1938, p. 153) supporting a decision on this ground 4. Moreover, a decision on this ground would in no way conflict with the English decision in *Lorentzen* v. *Lydden*, which is the next case to be considered (because His Majesty's Government recognized no Government other than the Norwegian Government as the Government of any part of Norway *de jure* or *de facto*). It may well be that ground 4 is a sounder basis for the decision than 3. It is hardly possible to reconcile the decision (if based on 3) with the *Lorentzen* case, except by saying that in the latter case public policy required the recognition of the Norwegian decree and public policy is to be taken as the real basis of a decision, which is really contrary to general principle. This is not a satisfactory view of the *Lorentzen* case.

In basing their decision on ground 3 the Scottish judges relied on the same cases as those which Atkinson J. discussed and distinguished in the *Lorentzen* case. These cases showing that foreign legislation of a confiscatory character, depriving owners of their property, is not allowed by our courts any extra-territorial application were the *Russian Commercial and Industrial Bank* case, 1925, [A.C.] 112; the *Sedgwick Collins* case, [1927] 95. The judges also referred particularly to *The Jupiter* No. 3 ([1927] P. 122: *B.Y.B.* 1928, p. 176), where Hill J. declined to hold that the right of ownership of a Russian vessel was affected by a Soviet decree, which liquidated the owning company and nationalized its assets, the ship being at the relevant time outside the territory controlled by the Soviet Government. They laid stress on the statement of Hill J. that ships were not governed by principles different from other chattels, but it is to be noted that Hill J. was dealing with the confiscation and not the requisitioning of a ship, and requisitioning may stand on a different footing. Nor is the view that a ship, or at any rate the requisitioning of a ship, may present special features necessarily affected by the view of the Privy Council, relied upon by the Scottish judges, in *Chung Chi Cheung* v. *The King* (B.Y.B., 1939, p. 146: 55 T.L.R. 184), that a ship is not a floating part of the flag state; or by the fact that a private ship (as the *El Condado* was at the time of the requisition) is, when in a foreign port, subject to the jurisdiction of the territorial power, a jurisdiction which incidentally does not exclude that of the flag state altogether. The Scottish judges, while admitting that the earlier cases, such as the *Jupiter*, did not entirely cover the case, since the Spanish decree here was not a confiscatory transfer of ownership but only a requisition, did not think that this distinction made any difference in principle.[1] Here it is suggested their view may be wrong and conflicts with the (English) *Lorentzen* case.

The decision of the Scottish courts on points (1) and (2), however, is a perfectly correct appreciation of the position when a foreign Government invokes the jurisdiction as a plaintiff and of the effect of the dismissal of an action against a foreign Government as defendant on the ground of immunity.

Case No. 4. We will now consider, somewhat fully, the English case, which we have just said is not wholly consistent with this Scottish decision.

Lorentzen v *Lydden and Company, Limited* [1942] 2 K.B. 202, 58 T.L.R. 178 (Atkinson J.).

The plaintiff was the curator, appointed by the Norwegian Government under a Norwegian Order in Council dated the 18th May 1940, and made at Tromso just before the Norwegian Government left Norway on the German occupation of the country and established itself in London. Under the Order in Council the Norwegian Government :

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[1] Lord Pitman says at p. 436: "requisition is not a legal method in this country of transferring property or rights of user of property except at the instance of the Crown. It is the prerogative of the Crown in times of imminent national danger to take any steps necessary to secure the defence of the realm, and in 1914 by virtue of that power regulations were made by His Majesty in Council providing, *inter alia*, for the requisitioning of ships by the competent naval authority. It would be strange indeed if a foreign State were allowed to exercise similar powers here, and by its officials take forcible possession of property requisitioned." Perhaps it may also be thought strange if the British Crown, which requisitions British vessels in foreign ports and expects this position of those ships obtained in that way to be recognized by foreign courts, should fail by its own courts to accord to foreign governments that which it desires for itself; admittedly, however, in any event, British courts do recognize the foreign government's possession as being immune from interference on the ground of immunity. The words "take forcible possession" perhaps deal too shortly with a situation which may take three forms, viz. (1) the foreign government has (as in this case) obtained possession perfectly peaceably of a requisitioned ship in British waters; the question is "will the British courts recognize as legal the possession thus peaceably obtained"; (2) the attempts of the foreign government to obtain possession are resisted and it cannot obtain it peacefully: here it has already been suggested (see page 181 above) that the police of the port will restrain forcible measures which may lead to a breach of the peace irrespective of which side benefits from the police interference; (3) a foreign requisitioning government being unable to obtain possession peaceably appeals to a British court to put it into possession. It may well be that there is a distinction between cases (*a*) and (*c*) and a British court would in case (*a*) recognize a posessory title thus obtained, whereas in case (*c*) it would not put the foreign government in possession by virtue of a decree of its own. This distinction has some analogies to what happens with regard to foreign revenue laws; a British court will not enforce the claim of a foreign government for taxation, but on the other hand it would recognize that a foreign government had validly acquired a title to moneys in this country which had been paid to someone on its behalf to meet a revenue claim.

(1) requisitioned all ships registered in Norway, which were outside the area occupied by the German forces at the time of the Decree and were owned by persons or companies domiciled or carrying on business in Norway;

(2) gave powers to the curator to exercise, to the exclusion of the owners, the rights of property over the requisitioned ships, and over all assets belonging to persons or companies domiciled or carrying on business in Norway which were applied to their shipping business or acquired in that business, and to enforce claims belonging to these shipowners by action or to compromise them and give valid discharges; and

(3) provided that compensation for property taken over should be fixed in accordance with Norwegian law.

A letter from the Foreign Office was in evidence, showing that the Government of the United Kingdom recognized the Norwegian Government as the *de jure* Government of Norway and recognized no other authority as the Government of any part of Norway, *de jure* or *de facto*. The defendants were an English company which had chartered before the date of the Order in Council a Norwegian ship which had been sunk before the Order in Council was made. This ship belonged to a Norwegian company carrying on business in Oslo. The claim was for breach of the contract of charter for the carrying of a cargo from Oslo to Leith, a contract which it was alleged the defendants had repudiated in October 1939. The obligations which the defendants were alleged to have broken were to be performed in Oslo. The defendants disputed the claim on the grounds (*inter alia*) (*a*) that the Norwegian Order in Council could not transfer the title to movable property (tangible or intangible) situated in the United Kingdom, because foreign legislation affecting rights over property is not recognized under English law as having any extra-territorial effect; that the *situs* of a debt is the place where the debtor is to be found and sued, and thus it was so situated in England; and therefore that the plaintiff had no right to sue: (*b*) that the Order in Council did not by its own terms cover this particular claim.

It was ordered that these two points should be tried as a preliminary issue.

It was held

(1) (on the evidence of a Norwegian lawyer) that the Order in Council was valid by Norwegian law and by that law binding in Norway and on Norwegian subjects everywhere, and applied to all shipowners carrying on business in Norway, and therefore to the assets of this Norwegian company, whether or not at the time the Order in Council was made, it owned a ship outside occupied Norway;

(2) (*a*) that, if the principle of English law applicable was correctly stated by Dicey in the words, "It (*sc.* a foreign State) may legislate for and give judgments affecting things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory". This principle was qualified in two ways, viz., the passage only purported to state the position "speaking very generally" and contained an exception "unless they are its subjects". This Decree only affected the property of Norwegian subjects; (*b*) that this Decree was not confiscatory and there was no English decision showing that foreign legislation, affecting proprietary rights, could *not* be recognized as affecting property in the territory of the State enacting it, when such legislation was not confiscatory; (*c*) that English public policy demanded the recognition of this Norwegian Decree, since Norway was allied with this country in the war effort.

The decision seems to be correct, but the reasoning in the judgment is hesitating and somewhat confused. The Judge purported to be following in his conclusion on point (2) two decisions in the United States, namely, *Anderson* v. *N.V. Transandine*, etc., a decision of the New York Court of Appeal regarding a Netherlands Decree of May 1940, and *U.S.* v. *Belmont*, a decision of the United States Supreme Court of 1937. The facts of these two American cases are not given, merely short quotations which, without their context, appear to say too much or too little.[1] The previous English decisions referred to are also treated rather too summarily for the distinction in principle to emerge clearly. The Judge in his judgment first considered the case as one of the transfer of a *chose in action* and in the light of the English rules for the choice of law with regard to the transfer of *choses in action* by arrangements between private parties, taking for this purpose the rule set out in Dicey's *Conflict of Laws*, viz., Rules 153 and 154. He then went on to consider whether these rules applied to a transfer by a foreign legislative act.[2] As regards transfers by foreign legislative measures, the position under the previous English decisions is that foreign legislative measures of a nationalizing and confiscatory character will not be recognized as applying to movable property, whether chattels or choses in action situated outside the territorial jurisdiction of the Government enacting them (*The Jupiter*, [1927] P. 122; *B.Y.B.*, 1928, p. 176; *The Employers' Liability Assurance Company* v. *Sedgwick Collins*, [1927] A.C. 95; *B.Y.B.*, 1927, p. 199: *Manufacturing Company I.A. Wormin*, etc. v. *Huth*, 1930; *B.Y.B.*, p. 235), but such measures are recognized as effecting a transfer, if the property is within that territorial jurisdiction, whether they are confiscatory or not (*Luther* v. *Sagor*, [1921] 3 K.B. 532; *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718; *B.Y.B.*, 1930, p. 233), but clearly this does not cover all the ground. Does it make any difference, if the foreign legislative measure is not confiscatory? In particular, if it is a war measure of a kind also taken by the Government of the United Kingdom itself in time of war? Is the requisition of ships flying the national flag always on a different footing? As regards the last point, it was pointed out in the *British Year Book* for 1938, at pages 244 and 247, that the decision of the House of Lords in the case of the *Cristina* (a Spanish ship case during the Spanish Civil War) carefully left open the question whether a foreign Government could requisition a ship flying its flag in a port outside its jurisdiction, and that there were reasons, including one sentence in the judgment of Lord Wright, for holding that a ship was in a special position and requisition different from nationalization. This question still remained entirely open after the decisions reviewed in the 1939 number of the *British Year Book*. Since then there is one decision, that of the Scottish Court of Session, which we have just been considering, refusing to recognize that the Spanish Government acquired any title to a Spanish ship which it requisitioned while in a Scottish port, but it would be unsafe to build too much on this one decision, particularly as it is based by some of the judges also on another ground, viz., that His Majesty's Government did not recognize the Spanish

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[1] In the *Belmont* case, the U.S. Supreme Court apparently recognized that a Decree of the U.S.S.R. dissolving Russian companies and nationalizing their assets, had the effect of transferring the right to a debt owing by a U.S. citizen and situate in the U.S. from the defunct company to the U.S.S.R., which had transferred it to the Government of the U.S.A. by an international agreement. As this Decree might be said to be confiscatory, the decision seems to be quite inconsistent with the English cases, but it may be that the decision with regard to the assets of defunct companies is a special one (the English courts have recognized that such Soviet decrees destroy the personality of the company, but not that they transfer assets in the U.K.), and probably the decision was influenced, on public policy grounds, by the fact that the U.S. Government had acquired the title by an international agreement.

[2] The first part of this inquiry was probably unnecessary, because there seems little reason to suppose that the rules considered under it have any application when the question is the effect of foreign legislation altering private proprietary rights. Dicey's rules indicate that the English courts will recognize transfers, if valid in accordance with either the *lex situs* of the object transferred or the *lex actus* of the transaction of transfer, or the *lex domicilii* of the owner or transferor. It seems obvious that the same proprietary rights cannot be affected by requisitioning or nationalizing legislation of all these possibly different countries.

Republican Government, but the Spanish Nationalist Government as the Government *de facto* controlling Bilbao, the port of registry of the ship and the seat of the company owning her. This Scottish decision was not apparently considered by Atkinson J., and, as we have already said, his judgment is inconsistent with it—especially where he relies on the non-confiscatory character of a decree as making a difference. The Spanish requisitioning decree was *not* confiscatory.

Atkinson J.'s judgment reads as if he thought that the English decisions only showed that the principle, that foreign legislation affecting proprietary rights could only be recognized as affecting property in the foreign State enacting it, really only applied to confiscatory legislation. The principle, however, is a general one of wider application than this, though there are no doubt exceptions to it and it is desirable that they should become (gradually) defined. Apart from the fact that the Norwegian Decree was not confiscatory, the Judge only makes the points (1) that the rights of Norwegian nationals only are affected;[1] (2) that public policy was in this case in favour of recognizing the application of the Decree. Perhaps more could have been made of the fact that the principal object of the Decree was a requisitioning of ships and the other provisions were really ancillary to this, and that requisitioning of ships flying the national flag, wherever they may be, may stand on a special footing and is a measure which the Government of the United Kingdom itself takes in time of war and expects to be recognized by foreign courts.

Case No. 5. The case of *In re Amand* is a remarkable one for many reasons, including the unusual number of courts and judges before whom it came. From the point of view of the general rules of international law, public and private, it is of interest as dealing with two different topics. In the first place it involved the consideration of the limits of territorial and personal sovereignty respectively. As illustrated in this case, a foreign sovereign may by virtue of his personal sovereignty legislate for his nationals in the United Kingdom (and also in respect of the property of his nationals there): in particular he may by legislation conscript his nationals in the United Kingdom, and cause notices summoning them to serve, to be delivered to them through the post or by his consuls in the United Kingdom. On the other hand, as a result of the territorial sovereignty of the United Kingdom, the extent to which the legislation of a foreign sovereign affecting persons and property in the United Kingdom can be recognized and given effect to in the United Kingdom depends upon English law applied through the English courts. The two cases which we have just been considering (Nos. 3 and 4 above) are concerned with the extent to which English law will recognize and give effect to the legislation of a foreign sovereign affecting his nationals or their property in the United Kingdom.[2] In the matter of conscription for military service, the territorial sovereignty of the United Kingdom in the ordinary way produces the result that the foreign sovereign can only enforce his orders by such measures as he can take within his own territory, and through his own courts. In the ordinary way his calling up orders cannot be enforced in the United Kingdom by any direct personal compulsion on the conscript, nor can any other penalty be enforced in the United Kingdom. Further, in the ordinary way a foreign sovereign cannot organize or maintain military forces in British territory nor could he enforce his military law against members of such forces if they were here. Again, in the ordinary way, the foreign sovereign cannot establish himself on British soil and carry on his administrative and legislative functions there. This case, however, deals with circumstances where the way was not the ordinary one and where by the invitation of the Crown, the Dutch sovereign and Government were established in the United Kingdom and carrying on the functions of government from British soil; where, with the consent of the British sovereign, expressed through an Act of Parliament, the Dutch sovereign was maintaining forces in the United Kingdom and with a right to subject them to Dutch military law and to receive the assistance of the British authorities in this connexion. As the case provides full information with regard to this unusual situation (a situation, of course, not confined to the Netherlands), it seems worthwhile dealing with it more fully than would be required merely for the purpose of showing its effect with regard to the two general topics of international law with which it deals.

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[1] I.e. personal sovereignty. However, this point was not allowed to make any difference in the case of *Don Alphonso* v. *Banco de Viscaya*, 1935, *B.Y.B.*, p. 207; nor in the case of the Soviet decrees dissolving Russian companies and nationalizing their assets (*Lazard* v. *Midland Bank*, 1933, *B.Y.B.*, p. 186, and later similar case).

[1] Clearly legislation dissolving national companies is on the same footing.

The second topic which fell for consideration in this case was the question whether the English courts can inquire into the validity of a decree of a foreign sovereign Government under the law of the foreign country in question. It has sometimes been stated that it is a breach of comity for the English courts to inquire whether an act or legislative decree of a foreign government is valid by the law of the foreign state in question and that the English courts must assume that a foreign government always acts in accordance with its own law. It was held in this case (though one judge, Croom-Johnstone J., had considerable doubt) that this rule (or supposed rule) does not apply to a decree of a recognized sovereign Government when that Government makes its decree in the United Kingdom and the decree applies to persons in the United Kingdom and, by reason of an English Act of Parliament, British authorities are called upon to assist in enforcing it, and when there are no other courts which can pronounce upon its validity because, owing to enemy occupation, the courts of the sovereign which made it are not available. It does, however, appear from the judgments in this case that it was more or less assumed that there was a rule which prevented the English courts from inquiring into the validity of an act or decree of a foreign sovereign government when everything that was done was done in the foreign sovereign's territory and in relation to persons or property there. The view seems to have been taken that this was established by certain judgments in earlier English cases which are referred to in the footnote below.[1] It is submitted, however, that there is a misapprehension on this point and that the real meaning of the passages quoted, a meaning which appears, if they are read in relation to the cases in which they occur and the arguments which were put forward, is that the English courts must recognize as valid anything done in foreign territory to persons and property there *in accordance with the law of that territory*. In relation to such acts, the English court is debarred (it may be from considerations of comity or it may be because of the advantage which flows from the recognition on the part of every State of the right of every other State to deal with persons and property inside its jurisdiction) from considering whether the acts are contrary to British public policy as being confiscatory, based on racial discrimination, etc.; whereas, when the

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[1] In *Luther* v. *James Sagor & Co.* ([1921] 1 K.B. 456, at p. 476) Roche J. said, "If a foreign government is recognized by the government of this country, the courts of this country may and must recognize the sovereignty of that foreign government and the validity of its acts". The same case was considered by the Court of Appeal, further facts having come to light. Warrington, L.J. ([1921] 3 K.B., at p. 548) laid it down as well settled that "the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country", and he quoted with approval Clarke J., when, in delivering the judgment of the Supreme Court of the United States of America in *Oetjen* v. *Central Leather Co.* (1917, 246 U.S. 297), he said: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". In *Princess Paley Olga* v. *Weisz* ([1929] 1 K.B., at p. 725), Scrutton L.J. said: "Our courts are bound to give effect to the laws and acts of that government so far as they relate to property within that jurisdiction when it was affected by those laws and acts".

English court is called upon to consider the effect of the acts or legislation of a foreign sovereign in regard to persons or property in England, these are matters which, *inter alia*, it does have to consider. The passages in the judgments relied on are not clearly directed to the distinction which can be drawn between the will of the foreign sovereign expressed in the form of the foreign law and acts authorized by that law and the will of the executive government of the foreign country which may, as governments sometimes do, act contrary to the law of the country. It is submitted that there is nothing to prevent an English court in any case from inquiring whether the act of a foreign government, whether a decree or otherwise, is valid according to the law of the foreign country, and indeed the English courts have on various occasions done so. There is a case dealt with in this number of the *Year Book* (Case No. 7 below) where the English court questioned the validity of the acts of the Spanish Government in Spain. On the other hand the presumption in case of doubt is always in favour of validity.

It may be added that official declarations of a foreign Government as to the effect of the law of its country are also of great weight, but they have never been held to be conclusive but to be at most evidence on foreign law which has to be proved in the ordinary way (*vide The Jupiter*, No. 2, *B.Y.B.*, 1926, p. 220—effect of Soviet nationalisation decrees—and *Hahn* v. *Public Trustee*, *B.Y.B.*, 1926, p. 217, certificates as to German nationality law.)

In re Amand

No. 1. [1941] 2 K.B. 239 (Div. Court).
No. 2. [1942] 1 K.B. 447 and 57 T.L.R. 187 (Div. Court).
[1942] 2 K.B. 27 and 58 T.L.R. 198 (C.A.).
[1943] A.C. 147 and 58 T.L.R. 382 (House of Lords).

Amand applied for a writ of "habeas corpus"[1] and notice of his application was served on the Home Secretary, the Officer Commanding the Netherlands Army Camp in the United Kingdom and the General Officer of the Metropolitan Police at Bow Street. The application was opposed by the Attorney-General on behalf of the Government of the United Kingdom and by the Counsel of the Netherlands Minister of Defence. The facts were as follows.

As a result of the occupation by the German forces of their territories in Europe, the Queen of the Netherlands and the Netherlands Government (as well as other European governments) had at the invitation of the Government of the United Kingdom transferred themselves to the United Kingdom, where they were established and exercising their governmental functions. The Government of the United Kingdom recognized the Netherlands Queen and the Netherlands Government as the Sovereign and Government of the Netherlands and as exclusively competent to carry out the legislative, administrative and other functions appertaining to the Netherlands Sovereign and Government and as a Power allied with His Majesty. In order to enable the Netherlands and other Allied Governments to maintain armed forces in the United Kingdom and to apply to members of those forces their own military law and to secure that the Allied military authorities should have the assistance of the British authorities and police in securing the return of deserters and the detention in prison of soldiers, sentenced by their military courts to imprisonment, and that such sentences should be a lawful imprisonment under the law of the United Kingdom, the Allied Forces Act, 1940, was enacted in August 1940. This Act provided *inter alia* that the military courts and authorities of Powers allied with His Majesty were authorized to exercise in the United Kingdom in relation to members of their forces all such powers in matters concerning discipline as were conferred on these military courts and authorities by the law of that Allied Power. This Act was applicable to the forces of those Allied Powers, which were from time to time specified by His Majesty in Council, and an Order in Council of October 1940 applied this Act to the Netherlands. Under the Act and Order in Council the provisions of the United Kingdom Army Act relating to the apprehension of deserters and absentees from the British forces were applied to Netherlands deserters and absentees.

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[1] The time-honoured remedy under English law for a man who claims that his personal liberty is being infringed illegally. The procedure is to apply for a writ of Habeas Corpus to the King's Bench Division of the High Court, a writ which, if granted, is directed to the party holding the applicant, ordering him to bring up the body of the applicant before the court. The general practice is for applications for habeas corpus to be heard by a Divisional Court of three judges of the K.B.D., though a single judge of any Division can hear it, or sometimes does, for instance, in vacation. The remedy of habeas corpus is open to British subjects and to all foreigners within the realm, who are under the protection of the Crown, and are entitled to resort to the courts to secure any rights that they may have. It is not, therefore, open to prisoners of war or to alien enemies interned for the safety of the realm under the royal prerogative. A peculiar feature of the habeas corpus remedy is that an applicant who has failed in his application before one judge or one Divisional Court, can, if he likes, start all over again before another judge or another Divisional Court and in theory may do this any number of times, though of course in practice unless the applicant has something new to bring forward in his later applications they are likely to receive short shrift.

Amand, a Netherlands subject, had lived in the United Kingdom for a number of years. After seeing a notice issued in July 1940 by the Netherlands Government requiring Netherlands subjects in the United Kingdom to send particulars to the Netherlands consul, Amand did this and voluntarily underwent a medical examination, which he knew was for military purposes, in July 1940. In August 1940, but before the date of the Allied Forces Act, the Queen of the Netherlands issued a Decree concerning compulsory military service of Netherlands subjects residing in the United Kingdom, requiring them to register for military service and providing for a penalty for failure to comply. Amand received a calling-up notice from the Netherlands authorities under this decree which mentioned a penalty for disobedience. Amand obeyed the calling-up notice and reported to the Netherlands camp.[1] After short service Amand was given sick leave after a motor accident, which leave expired in January 1941. He again reported for service and was given a week's leave, at the end of which he applied for further leave for business reasons, which was refused. Being interviewed by the Metropolitan Police, he promised to return to camp, but did not do so, having at that time received some legal advice to the effect that he could not be forced to serve as a Netherlands soldier. He was then arrested by the London police as a deserter at the request of the Netherlands authorities on the 14th March. Amand never signed any document under which he expressed his willingness to join the Netherlands forces or admitting that he had joined, but at no time between August 21st, 1940, and January 30th, 1941, had he made any protest that he was not a member of the Netherlands forces or against being compelled to join them. He had drawn pay for himself and his family. He now contended that he was not a member of these forces within the meaning of the Allied Forces Act and Order in Council and applied for a writ of habeas corpus to secure his release from the custody which he was at present in for the purpose of being handed over to a Netherlands court for trial as a deserter. This contention was based on the grounds that:

(1) (as stated by witnesses on Netherlands law called by the applicant), the

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[1] In fact the penalty for disobedience could not have been enforced in the U.K., but only in the Netherlands if and when Amand rteurned there, but Amand declared he did not know this and was deceived. Another point which is discussed later is whether Amand could have been arrested as a deserter and forced into the Netherlands forces if he had not obeyed the calling-up notice.

Netherlands Decree of August 1940 was invalid by Netherlands law because (*a*) the Queen could not issue a decree when she was outside Netherlands territory; (*b*) the Queen and Government had no power to legislate with regard to conscription at all, such legislation having under the Dutch Constitution to be by Statute; (*c*) the Queen and Government could not impose penalties by decree, penalties being only imposable by statute under the Netherlands Constitution.

(2) The decree, even if valid by Netherlands law, could not be recognized in English law because the Queen had no power to legislate (*a*) on English soil; (*b*) with regard to persons in England, unless an Act of Parliament had conferred power upon her. She could not acquire this power merely by the consent of the Crown.

(3) For these reasons Amand could not have become a member of the Netherlands forces by conscription.

(4) Amand did not become a member of these forces by voluntary enlistment because the requirements for voluntary enlistment were not complied with. To make a person liable to military law involved a change of status, and such a change of status could not take place by conduct. Amand only joined the Netherlands forces because he was misled by the Dutch authorities serving a notice calling him up with penalties for disobedience, when it should have been explained that the penalties were not enforcible in the United Kingdom and the notice was issued under an invalid Netherlands decree.

It was contended for the Netherlands Minister of Defence:

(1) Amand had become a member of the Netherlands forces within the meaning of the Allied Forces Act as from the 19th August 1940, when he reported at the camp, because he actually joined those forces, served and drew pay. If Amand joined the Netherlands forces as a conscript he was a willing conscript. It was not material that he misunderstood the legal position with regard to the enforcement of the penalty in the Netherlands decree.

Alternatively (2), (*a*) under the Allied Forces Act the question whether a person was a member of the Netherlands forces was left to be decided by Netherlands law and Amand had become a member of those forces because he was conscripted under a Netherlands decree; (*b*) the decree of August was valid in Netherlands law because (as stated by the witnesses on Netherlands law called on behalf of the Minister) there is an inherent right in the Netherlands Sovereign to legislate in time of war outside the Constitution and further to legislate without consulting the Council of State; (*c*) in any case as the decree was a decree of the *de jure* Sovereign and Government of the Netherlands, its validity under Netherlands law cannot be impugned in an English court on the doctrine that the English courts do not question the validity of the acts of foreign sovereign Governments under the law of their own country (*Luther* v. *Sagor* and *Princess Paley* v. *Weisz*); (*d*) the calling-up notice was not invalidated under Netherlands law by the fact that Amand misunderstood the position with regard to the enforcibility of the penalties in England; (*e*) the Government of the Netherlands has under international law jurisdiction over its nationals abroad and can legislate for them, though it cannot enforce such legislation in the United Kingdom except so far as the law of the United Kingdom allows, and the Allied Forces Act and Order in Council did provide for the enforcement of Dutch military law against members of the Netherlands forces in England, including the arrest of deserters, and recognized those persons to be members of the Netherlands forces who were so under Netherlands law.

The Attorney-General supported generally the arguments presented for the Netherlands Minister of Defence and in particular stressed 2 (*a*), (*c*), (*d*) and (*e*).

In reply it was contended for Amand in answer to argument 2 (*c*) that the statements in *Luther* v. *Sagor* and *Princess Paley* v. *Weisz* were made with regard to decrees that a Government made in its own territory and applied to persons and property there.

Held (by Lord Caldecote C.J., Humphreys and Singleton JJ.):

(1) the sole question for determination was whether Amand was at the time of his arrest in March 1941 a member of the Netherlands forces. If he was, then there was no doubt that his arrest and detention was legal under the Allied Forces Act 1940 and the Order in Council. If not, Amand must be released.

(2) Amand was not a member of those forces by voluntary enlistment because he only obeyed the Netherlands summons and served in those forces because he considered that he had no choice.

(3) Therefore if he became a member of the Netherlands forces it must be because he was made a member by the Netherlands decree and the calling-up notice.

(4) The English courts were not obliged to accept the validity of the Netherlands decree in Netherlands law merely because it was a decree of the recognized Sovereign and Government. The cases of *Luther* v. *Sagor* and *Paley* v. *Weisz* did not cover the point since they related to acts done in the territory of the foreign sovereign.

(5) Upon the evidence given on both sides as to Netherlands law, the decree should be regarded as valid by Netherlands law.

(6) The effect of the decree and the calling-up notice was to make Amand a member of the Netherlands forces and his application for habeas corpus must be rejected.

Amand appealed to the Court of Appeal against the decision of the Divisional Court, giving notice that he desired to cross-examine the witnesses on Netherlands law called by the Minister of Defence and to adduce further evidence from his own witnesses. The Court of Appeal held that his proper course was to make a further application for a writ of habeas corpus, which he could do notwithstanding the dismissal of his first application. Amand did so, and thus began the second set of proceedings in *In re Amand No.* 2, which came before the Divisional Court in January 1942. The applicant again sought to impeach the authority of the Netherlands decree by Netherlands law, and both the Minister of Defence and the Attorney-General took as a preliminary objection the point that it was not open to the English courts to inquire into the authority of the decree by Netherlands law since it was a decree of the recognized Government of the Netherlands.

Held by Wrottesley, Croom-Johnston and Cassells JJ.:

(1) Amand did not become a member of the Netherlands forces by voluntary enlistment but because he was summoned to comply with the decree.

(2) That the Netherlands Queen and Government in the exercise of their personal sovereignty were entitled to legislate for Netherlands nationals in the United Kingdom, including the conscripting of such nationals. Foreign governments had for a long time conscripted their nationals abroad and summoned them by notices from their consuls in the United Kingdom.

Amand appealed from this decision to the Court of Appeal and from the Court of Appeal to the House of Lords. His appeal, however, was rejected on a technical point of English law, namely, that in the circumstances of the case an appeal did not lie, because no appeal can be brought to the Court of Appeal in a "criminal cause or matter". This rule applies in some circumstances to appeals in habeas corpus proceedings. The expression "criminal cause or matter" means that (1) consideration of some crime or offence against public law is involved, and (2) that a charge in respect of this offence is preferred or about to be preferred before a judicial authority having or claiming jurisdiction to impose punishment for it. If therefore it is found in the habeas corpus proceedings that the person claiming release is accused of an offence and will be tried by a court having jurisdiction over the offence, the decision refusing release is a decision in a criminal cause or matter. The rule covers offences against foreign law and trial by a foreign court, because a decision refusing habeas corpus in extradition proceedings has been held to fall under it. The question, therefore, was whether the decision of the Divisional Court refusing a writ of habeas corpus to Amand, who was required as a deserter from the Netherlands forces, was a decision in a criminal cause and matter. It was held that it was, it being already settled law that desertion by a soldier from the armed forces of the Crown is an offence and that a British military court is a judicial authority within the meaning of the rule. In the circumstances created by the Act of 1940, desertion from an Allied force and an Allied military court were brought within the meaning of the rule.

It will be seen that the view taken by the courts in the case of *In re Amand* proceeded on the basis that anyone who was a member of the Netherlands forces by Netherlands law, was a member of these forces within the meaning of the English Act of 1940, and, therefore, whether he had in fact served or not, could be forced to serve in England with the assistance of the police. If this principle had been left to govern all cases, considerable complications might have occurred; for instance, one and the same man might be a member of two different Allied forces, or a member of the British forces and an Allied force, or the person might, in fact, not have been a national of the country conscripting him at all. The Act of 1940 was probably at fault in not defining the expression "member of an Allied force" and this omission was rectified in Section 5 of the Allied Powers (War Service) Act, 1942, which defines a member of the forces of an Allied power as "a person who has served in this force on or after the date of the passing of the Act of 1940 and has not been duly discharged therefrom" and goes on to say that a person who has not so served shall not be deemed to be a member of the force merely by reason of his having been called upon to serve therein. This same Act contains provisions under which a person in the United Kingdom who is a national of an Allied power is conscripted into the British forces unless he joins an Allied force within a certain time limit.

Case No. 6. There is another case in the period under review which brings out some further points in connexion with the British remedy of habeas corpus, namely, *In re Ning Yi-Ching* (56 T.L.R. 3). In 1939 there was, in the Chinese city of Tientsin, a British concession which was administered by a British municipality (presided over by the British Consul-General) and by British police in the employment of that municipality. The position under the treaties with regard to jurisdiction over offenders was that British subjects were tried by British courts, Chinese by Chinese courts and persons of other nationality by their consular courts. Four Chinese, who were accused of murder and other serious offences by the Japanese, were arrested by the police of the British concession with a view to being handed over for trial by the Chinese District Court at Tientsin, which at that time was *de facto* largely under Japanese control. There were various people in England, including in particular a committee called the Chinese Campaign Committee, who were in touch with the Chinese Embassy in London, who desired to prevent the handing over of these four Chinese for trial by this district court. The chairman of this committee, therefore, applied to the English courts for a writ of habeas corpus directed to the Foreign Secretary, the British Consul-General at Tientsin, the Chairman of the Municipal Council and the gaoler of the British prison in Tientsin, and a summons was issued calling on the Foreign

Secretary to show cause why the writ should not be issued directing the bodies of these four Chinese to be brought from China before the court in England for the purpose of having an inquiry into the legality of their detention. The first point to notice here is that any person can apply for a writ in respect of any other person. It is not necessary that the person detained should apply himself. Now at one time a writ of habeas corpus could be taken out in the English courts in respect of the detention of persons not merely in England, but also in any other part of His Majesty's dominions in the strict sense of this term, i.e. in British Dominions or British Colonies. In the case, however, of the Dominions and Colonies this was changed by the Habeas Corpus Act of 1862, the effect of which was that in case of detentions in Colonies, etc., the application for habeas corpus must be made to the courts of the Colony. It had, however, never been possible to take out a writ of habeas corpus in respect of the detention of anybody in foreign territory, and foreign territory includes here, not merely territory which is foreign in the ordinary sense, but also territory which is British in the international sense, such as a British protectorate, protected state or mandated territory. These territories are administered under the Foreign Jurisdiction Act, 1890, and are regarded as foreign for the purposes of English Municipal Law, though, of course, they are British from the point of view of international law. It was clear that the municipal concession in Tientsin was not British territory in the narrow sense, and indeed it is not clear that it could be considered to have been British territory in any sense at all. Consequently, the application failed. A further ground on which it also failed against the Foreign Secretary was that he was in no way in control of the custody of the prisoners, though it was true that he was in a position to give advice and instructions which would probably be obeyed by those persons in Tientsin who actually held the prisoners.

Case No. 7. In 1939 two actions between the same parties came before the English courts, which taken together seem to be authority for two propositions of an important though somewhat subtle character relating to the position of foreign states and governments in relation to the English law and courts. These propositions are:

(*a*) That a foreign government (in the case in question, the Government of Spain) is, from the point of view of English law, rather like a corporation, in the sense that it is regarded as one continuing legal entity which does not die, although composed at different times of different persons. Consequently, the Government of General Franco could not, after it had been recognized as the *de jure* Government of Spain (as it was in February 1939), bring an action in the English courts in the name of the Government of Spain, in which it made a claim which was based upon the repudiation of the acts of the Republican Government of Spain, done when the latter was still the *de jure* Government of Spain, and contending that these acts were *ultra vires* and illegal. Before the English courts General Franco's Government after February 1939, and the Republican Government before that date, were the same legal entity, though composed of different persons, and the Government of Spain could not base a claim on the illegality of its own acts.

(*b*) A foreign government, however, is an organ of the foreign State and, though a most important organ of the State and that which ordinarily represents the State in relation to the outside world, the Government is not legally the same thing as the State. Governments may act illegally and *ultra vires* their powers under the law of the State and the State can claim that the acts of its Government at a given time were *ultra vires* and illegal. Consequently it was possible for an action to be brought in the English courts in the name of the Spanish State based on the contention that certain acts of the Spanish Government at a certain time were illegal.

These two principles seem to emerge from two cases in which exactly the same claim, brought *first* in the name of the Spanish Government, seemed so likely to fail that it was discontinued, and then, brought later in the name of the Spanish State, was successful. These two actions are reported only in *The Times* newspaper and possibly their legal interest may have escaped attention. The first is *The Government of Spain* v. *The Chancery Lane Safe Deposit, Ltd., De Reding and the Attorney-General* (reported in *The Times*, May 26th, 1939) and the second is *The State of Spain* v. the same parties (reported in *The Times*, May 26th, 1939). The first action was discontinued because proposition (*a*) appeared to be likely to cause serious difficulties to the plaintiff, and the second succeeded because proposition (*b*) was accepted by the judge as at any rate sufficiently strong to justify his granting an injunction pending trial and the defendant was clearly of the opinion that it would be accepted finally at the trial so that he abandoned the proceedings.

The facts were that shortly before the final collapse of the Spanish Republican Government, the Minister of Finance of the latter Government, purporting to act on its behalf, collected and removed from Spain securities and other assets of a value estimated between £1,000,000 and £2,000,000—transferred them to the defendant De Reding in England on condition that the defendant held them on trust as a trust fund for the benefit of Spanish refugees. It was the intention that the trust should be enforceable at the suit of the Attorney-General and that accounts for the latter being made a party to the proceeding. The securities were deposited in the Chancery Lane Safe Deposit and that is why this company were made defendants, though the company claimed no rights to the assets at all and were simply in the position of a party who appears to submit to any order that the court might make as a result of the decision in the dispute between the plaintiff and another defendant, i.e. De Reding. It was contended for the plaintiff that the removal of the securities and assets from Spain by the Republican Government and its Minister of Finance was illegal by Spanish law. The plaintiffs in both cases claimed the delivery of the property and an injunction preventing any disposal of the property pending the decision in the action. In the proceedings in the name of the Government of Spain an injunction was refused by Morton J., who declared himself impressed by an argument in the form of proposition (*a*) put forward on behalf of De Reding. In the second action in the name of the State of Spain Simonds J. granted an injunction, remarking that the claim of the Government of Spain was one thing and the claim of the State of Spain another, although the same persons were interested; i.e. he provisionally accepted proposition (*b*). He also declared that on the evidence then before him it appeared that the delivery of the property to De Reding was illegal and void.

Section II

In our second section there are three cases, all of which deal with aspects of diplomatic immunity: (*R.* v. *Kent*: *In re a Reference as to the Powers of the Corporation of the City of Ottawa*; *The Amazone*).

Case No. 8. In the case of *R.* v. *Kent* (57 T.L.R. 307) the facts were that the accused, Kent, had held the position of second secretary in the United States Embassy in London, where he was employed as a code and cypher clerk. As a second secretary he was a person covered by diplomatic immunity. Whilst so employed, he obtained possession in the Embassy of certain secret documents, which were not his property, and delivered them to one W. The communication to W. of these documents was prejudicial to the safety of the United Kingdom and for the benefit of the enemy. When these facts came to light Kent was, on the 20th May 1940, dismissed from his employment by the United States Ambassador, and the Ambassador also waived all immunity in respect of this matter as from the same date. In August 1940, Kent was charged:

(1) with larceny of these documents and

(2) with breaches of the Official Secrets Act of the United Kingdom.

Kent contended that the courts had no jurisdiction to try him because of diplomatic immunity. But his contention was overruled both by the trial judge and in the Court of Criminal Appeal, and he was convicted. The following points emerge from this case:

(1) A person covered by diplomatic immunity cannot be tried for a crime while his diplomatic immunity continues.

This point was admitted by the Crown, and therefore, as the L.C.J. said in the C.C.A., it was not necessary for the court to pronounce upon it. There is not, in fact, any English decision dealing with the question whether diplomatic immunity protects a person from trial in respect of crimes, but there is no case where a person still possessing such immunity has been tried for a crime, and it would seem that, if a person possessing diplomatic immunity cannot be sued in civil proceedings, *a fortiori* he cannot be tried in criminal proceedings, and the writers of international law state the rule as covering both classes of cases.

(2) Diplomatic immunity is an immunity from legal process. It does not, in general, render a person exempt from the operation of the local law.

(There are, of course, certain provisions of the local law which do not apply to persons possessing diplomatic status. This is not the place to try to enumerate these exceptions. One of them is referred to in the next following case. Another exception covers certain provisions of the Revenue Law.) This point was decided directly in the present case, but it is not new law. It is also clearly stated in the case of *Dickinson* v. *Del Solar* (*vide* the 1930 number of the *Year Book* on pages 227 and 231).

(3) Crimes against the local law may be committed in an Embassy building. An Embassy building has no extra territorial status to prevent the general application of the local law within its precincts.

This point was a necessary part of the decision in the present case which, up to date, forms the clearest English judicial authority on this point.

(4) When a person loses his diplomatic status he may be made liable criminally or civilly for acts committed while he possessed a diplomatic status.

Dickinson v. *Del Solar* is also authority for the same point. There must, however, be an exception to this general rule in respect of acts done strictly in the course of official duties as a member of the Embassy.

(5) Diplomatic immunity belongs not to the individual but to the State which he represents. Consequently, it may be waived by his Government or, in the case of a subordinate member of a diplomatic mission, by the head of the mission, whether the individual consents to its waiver or not.

This point is also brought out in the *Dickinson* case, but it appears in a stronger form here where the individual concerned by no means agreed in the waiver and was disputing its effect. There is no clear English decision on the position where a subordinate member of a mission himself waives his immunity and the head of the mission wishes to affirm it. At any rate, in civil proceedings where a subordinate member of a mission waives immunity by appearing as a plaintiff or defendant it is presumed that he has authority to do so.

(6) Diplomatic immunity ceases:

- (i) In the case of a waiver in respect of a particular matter as from the moment when the waiver takes place.
- (ii) Where there is no waiver, but the person's diplomatic status terminates, either because he is dismissed or because he has terminated

> his mission and is being appointed to another post, when the person concerned has had a reasonable time to wind up his affairs and leave the country.

Authority for point (ii) is to be found in a number of earlier English cases, and this case is of particular interest as establishing point (i). Kent strongly contended that his immunity did not cease until he had had an opportunity of leaving the United Kingdom, which he had never had, seeing that he had been under arrest as from the moment of his dismissal. His argument would have been good if there had not been a waiver of immunity as well.

(7) A statement by a law officer that a person does or does not possess diplomatic status at a particular date is conclusive and binding on the court.
The decision of the House of Lords in the *Musmann* case is also authority for this proposition where the statement of the law officer is positive. In this case the statement of the law officer was negative.

Case No. 9. The Supreme Court of Canada has, under the Constitution of Canada, the duty of giving advisory opinions upon legal questions put to it by an Order in Council made by the Governor-General of Canada in Council. When questions are thus put to the court, the court hears arguments from counsel for the interested parties, and consequently the opinion given in fact possesses much the same weight and authority as a judgment. An opinion given by the Supreme Court in April 1943 "*In the matter of a reference as to the powers of the Corporation of the City of Ottawa and the Corporation of the village of Rockcliff Park to levy rates on foreign legations* . . ." deals with a matter of diplomatic immunity, namely, the question whether foreign legations can be charged for local rates. Five Judges sat and gave their opinions, and of these a majority of three judges (the Chief Justice of Canada, Rinfet J., and Tashereau J.) held that it was not lawful to levy municipal rates upon the United States or French legations in Canada. The minority (Kerwin J. and Hudson J.) held that it was lawful to levy the rates on the legations, but that the payment of these rates could not be enforced by proceedings in the courts. There is a practical difference between these two answers, as, if the second view is right, a Minister may have become personally liable to pay rates, and payment can be enforced upon him if he retires or otherwise loses diplomatic immunity. It is therefore of some interest to consider which of these two views has the most to commend it. It is admitted that in general it is correct to say that a person possessing diplomatic immunity is not thereby exempt from the law of the country in which he resides, but only from the enforcement of that law upon him through the courts. The *Kent* case which has just been dealt with elucidates this point. So far therefore as this principle goes, it might seem to favour the view of the minority of the court. On the other hand, there is much to commend the view expressed neatly in the opinion of Tashereau J. that "it is a settled rule of international law that property belonging to a foreign Government [or][1] occupied by its accredited representative cannot be assessed and taxed for State or municipal purposes". This is to say that there is a special rule of international law requiring the exemption from taxation of foreign governments, their property and also all property occupied for diplomatic purposes. All the judgments are based largely upon cases decided in the English courts and upon certain statutes enacted in the United Kingdom, but deemed to be merely declaratory of the general law. There are indeed some statements made or quoted in two of the majority judgments, from which it might be inferred that diplomatic representatives were exempt from the operation of the law of the country in which they resided altogether, but it would not appear that these statements or quotations are to be taken as an essential basis of the decision. Reliance is also placed by some of the judges on the inviolability of legation premises, but it is doubtful whether this is really the reason for the rule. In conclusion, it may be noted that it seems to have been accepted throughout that it was lawful to charge foreign legations with water rates and lighting rates on the ground that such rates were only in the nature of payment for services rendered.

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[1] The word "or" does not appear in the copy of the judgment before the present writer, who is uncertain whether this is intentional or due to a printing error. In any case, it is submitted that the proposition would be true with the word "or" inserted.

Case No. 9 (*a*). *The Amazone* (56 T.L.R. 266) deals with a writ *in rem* against a vessel, and diplomatic immunity. The question of writs *in rem* and the immunity of foreign sovereigns has been fully considered in connexion with the cases of the *Christina* and the *Arantzazu Mendi*, where it was shown that a writ *in rem* against a ship must be set aside as impleading a foreign sovereign, if a foreign sovereign shows that he has possession of the vessel. In this case exactly the same principle was applied where the immunity was diplomatic immunity. The case arose out of a dispute between the Military Attaché of the Belgian Embassy and his wife as regards a yacht which the husband had had built, but which was paid for out of his wife's money. The wife took out a writ *in rem* to obtain possession of the yacht. The husband claimed (1) that he possessed diplomatic immunity and produced a certificate from the Foreign Office to the effect that he had been received by His Majesty's Government as Military Attaché and that his name was included in the list of persons entitled to diplomatic immunity issued under the old Act of Anne; (2) that he had possession of the yacht; (3) that the writ impleaded him and that there had been no submission to the jurisdiction, and that it should be set aside.

The husband succeeded in first instance and before the Court of Appeal, it being held that he had in fact got possession of the yacht. Two small points were advanced against the husband's claim and rejected. The first was that the certificate from the Foreign Office meant that the husband was only entitled to these diplomatic privileges which were actually indicated in the Act of Anne. The second was that the Act of Anne made no mention of Military Attachés, but only of Ambassadors and their servants, and the Act of Anne only protected the property of diplomatic persons and therefore it did not apply unless and until it had been shown that the ownership of the yacht was vested in the husband. It was held that the Foreign Office certificate had no such restricted meaning, but meant that the husband was a person who possessed diplomatic immunity not only under the statute but also under the common law, which included a Military Attaché, and that, as it had frequently been stated in earlier cases, the Act of Anne was by no means an exhaustive statement of the law about diplomatic privilege, but merely a penal statute which imposed penalties on people who did certain particular things. It may be wondered whether this is the last time that the English courts will be called upon to reject arguments based on the limitative nature of the provisions of the old Act of Anne.

Section III

Case No. 10. There are two decisions relating to international conventions, which have been made by statute part of the law of England, and which relate to private rights, *In re a Judgment Debtor* and *Phillipson* v. *Imperial Airways*. Here we are on the very borderland between Public and Private International Law.

Before the war, conventions were made with France and Belgium for the reciprocal enforcement of judgments, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933, was passed to give effect to these and other similar conventions that might be concluded in the future. The Act applies to judgments of those countries to which it is applied from time to time by Order in Council, and an

Order in Council has been made with regard to France. In the case of *In re a Judgment Debtor* decided in December 1938, by the Court of Appeal (55 T.L.R. 322 and [1931] I Ch. 601) it was held that where a French judgment has been registered in the English High Court in accordance with the Act of 1933, a bankruptcy notice can be served on the judgment debtor and the French judgment can be made the foundation of bankruptcy proceedings in this country in the same way as an English judgment. Section 1 of the Bankruptcy Act, 1914, provides that "a debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and, execution thereon not having been stayed, has served on him in England (or by leave of the court elsewhere), a bankruptcy notice". Now the words "judgment" and "order" in this provision refer prima facie only to an English judgment or order, but the Court of Appeal held that the effect of the Act of 1933 was to place a French judgment registered in England in the same position as an English judgment for the purposes of this section of the Bankruptcy Act. This conclusion was based on Section 2 (2) of the Act of 1933, which says that "(*a*) a registered judgment shall, for the purposes of execution, be of the same force and effect; and (*b*) proceedings may be taken on a registered judgment; and (*c*) the sum for which a judgment is registered shall carry interest; and (*d*) the registering court shall have the same control over a registered judgment, as if the judgment had been a judgment originally given in the registering court and entered on the day of registration". The argument against the conclusion at which the Court of Appeal arrived was the following:

From the point of view of the English courts, a judgment of a court in Scotland or Ireland or in a British Dominion or Colony is just as much a foreign judgment as a judgment of a court sitting outside the British Empire. Prior to the Act of 1933 there had been two previous Acts providing for the registration of judgments for the purposes of enforcement in England: namely,

(i) (Scottish and Irish judgments): the Judgments Extension Act, 1868;

(ii) (judgments in courts of British Dominions and Colonies): the Administration of Justice Act, 1920, Section 9.

Now it had previously been held with regard to a Scottish judgment registered under the Act of 1868 that the effect of registration was limited to the execution of the judgment in the strict sense and to the execution in the looser sense as covering equitable execution by way of receivership or garnishee proceedings, but did not cover the issue of a bankruptcy notice or a judgment summons under the Debtors Act of 1869. The Court of Appeal, however, pointed out that the provisions of the Act of 1933 as regards judgments registered under that Act were wider than the provisions of the Act of 1869 or of 1920. The earlier Acts only contained points corresponding to (*b*) of Section 2 (2) of the Act of 1933, but not (*a*) as well, and in the Act of 1933, in view of the provisions of (*a*), it was not possible to read the provisions of (*b*) as limited to proceedings by way of exemption in the more limited sense, which were already covered by (*a*). However, there was a further reason for reaching the same conclusion. Under the two earlier Acts, the procedure of registration is left merely as an alternative to the procedure of enforcement by an action on the judgment at common law. Consequently, a judgment creditor under, for instance, a Scottish judgment can, if he wishes to institute bankruptcy proceedings against his debtor, proceed by way of action at common law to retain an English judgment based on the Scottish judgment and then start his bankruptcy proceedings, but the Act of 1933 (Section 6) provides that no proceedings for the recovery of a sum payable under a foreign judgment to which the Act applies, shall be entertained other than proceedings by way of registration of the judgment. Therefore, the judgment creditor under a French judgment cannot bring an action upon the French judgment, and if he cannot institute bankruptcy proceedings under a registered French judgment, he is prevented from enforcing his French judgment in bankruptcy at all. That is to say that he would have been placed in a worse position than before the Act of 1933, whereas clearly the intention of the Act of 1933 was to facilitate his course.

Case No. 11. In 1939 the House of Lords gave a decision in the case of *Phillipson* v. *Imperial Airways* ([1939] A.C. 332).

The question was whether the contract of carriage in this case did, or did not, come within the terms of the Carriage by Air Act, 1932, which contained as a schedule (and made part of the law of the United Kingdom) the Convention signed at Warsaw in 1929 for the "Unification of certain rules relating to International Carriage by Air". This Act and Convention have been considered previously in the *Year Book* (1936, page 212; 1937, page 223; and 1938, page 253) in connexion with two other cases which have been before the English courts, and also in connexion with the *Phillipson* case in first instance and before the Court of Appeal, and reference may be made to these numbers for a fuller discussion of the matter. Another reason why it is not necessary to treat the matter in detail here is that, owing to the war, the subject matter has for the moment lost all practical importance and it is not impossible that after the war further developments may bring about changes in the rules agreed upon at Warsaw and in the scope of their application. It is, however, necessary to mention the case because a majority of the House of Lords (Lords Atkin, Thankerton and Wright; Lords Russell and Macmillan dissenting) reversed the decision of the Court of Appeal dealt with in the 1938 number of the *Year Book* and adopted a meaning for the expression "high contracting party" to the Convention which might be relied upon as a ruling of general application. In short, the majority of the House of Lords said that the expression "high contracting party" included a signatory who had not ratified, and some of the learned Lords justified this view not merely on the wording of the particular Convention in question, but also by expressing views about its meaning in diplomatic practice. It is with regret that the present writer feels it necessary to observe that, in this particular matter, the highest English tribunal, which in general has played so great and admirable a rôle in elucidating questions of international law which come before the English courts, has here fallen seriosuly into error. There is no doubt that in general practice, a high contracting party in relation to a Convention means a party who is bound by obligations under that Convention, and the expression therefore covers a signatory who has ratified and a party who has acceded, but not a signatory who has not ratified and who is still unbound. The principle ground, however, upon which the majority of the House of Lords (differing from two of their number and also the majority of the judges who had to consider this case in the courts below) was that the expression "high contracting party" must mean the same thing in all the articles of the Convention, and there were certain articles in the formal parts of the Convention at the end where undoubtedly the expression "high contracting party" must be held to cover a signatory who had not ratified. It is true that some of the formal articles at the end of the Warsaw Convention were badly drafted in this respect and differ from the corresponding provisions in most conventions where this error is generally avoided.[1] The view taken by the majority of the House of Lords on this ground might have been less unexpected if they had not failed to consider and to take into account (1) that the view they adopted was clearly contrary to the views of His Majesty's Government, who as parties to the Convention and in touch with the other parties were presumably in the best position to know what was intended; and (2) that their view produced a conflict of laws which it should have been clear that the framers of the Convention had been doing their best to avoid. As regards the first of these two points, the Act of 1932 gave His Majesty the power by Order in Council to specify who the contracting parties to the Convention were and the territories of these contracting parties to which the Convention applied, giving dates as from which they became parties or the different territories became bound. These Orders in Council were made by the Act conclusive evidence, though the Act did not say the Orders in Council were exclusive evidence, and His Majesty had issued Orders in Council from time to time specifying the high contracting parties, etc., issuing new Orders in Council as further signatories ratified. The question in the case was whether Belgium was at the relevant date the territory of a high contracting party. Belgium was an original signatory, but had not ratified at the relevant date, though she had ratified when the case was before the House of Lords, and the Orders in Council showed conclusively that in the opinion of His Majesty's Government Belgium only became the territory of a high contracting party as from the date of her ratification. The majority of the House of Lords held that Belgium was the territory of a high contracting party before ratification, which was therefore directly contrary to the view clearly expressed by His Majesty's Government through an Order in Council. As regards the second point, the object of the Convention was to lay down a uniform code of rules defining the liability of a carrier by air which were to be made obligatory by the law of all the parties to the Convention. As all the countries of the world would not be parties to the Convention and as there was no necessity from the international point of view for covering carriage by air which was confined to the territories of one State, the Warsaw Convention only made its rules applicable to cases of (what the Convention described as) "international carriage", and proceeded to define the expression "international carriage", and this case turned upon this definition. As Lord Justice Greene had well explained in a previous case, in order to avoid conflicts of law it was thought desirable to limit the compulsory application of the Warsaw rules to journeys where both the point of departure and the point of destination were situated in territories where the Convention would have the force of law, and this was expressed in the definition by referring to these points being within the territories of the high contracting parties. By holding that the rules of the Convention applied to a journey between London and Belgium at a time when the Convention was not part of the law of Belgium, the House of Lords failed to appreciate this point. It is probable that if war had not intervened soon after this decision, legislation would have been necessary in the United Kingdom to reverse the effect of this decision.

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[1] Except in one article which has never up to the present given rise to any misunderstanding, i.e. the so-called "Colonial article" which provides that "Any H.C.P. by a declaration made at the time of signature, ratification, accession or later" may make the convention applicable to a colony, etc. The declaration, if made at the time of signature, only takes effect after ratification.

Section IV

We now pass over definitely into the sphere of Private International Law and to a group of six cases of which the first deals with the problem of classification (*In re Cutcliffe's Will*) and the other five have as their common factor that they are all concerned with matters of personal status. One recognizes the preeminence of the courts of the domicile in the matter of nullity of marriage (*Galene* v. *Galene*), two others deal with Guardianship (*In re B.'s Settlement*; *In re the D. Infants*) and the last two with legitimacy and legitimation (*In re Paine* and *In re Luck*). Unfortunately (for different reasons) neither of these last two cases can be considered as wholly satisfactory. *In re Paine* also deals with the question of capacity to contract marriage.

Case No 12. *In re Cutcliffe's Will Trust* (56 T.L.R. 537) is an instance of the process which is variously called characterization, classification or, in French, qualification, a subject on which much light is thrown by Mr. A. H. Robertson's book.[1] In this case an estate was being administered in the English courts and the deceased person died domiciled in Ontario, Canada. Under the English conflict rules, moveable property is distributed in the case of intestacy according to the law of the deceased's domicile, and immoveable property according to the law of the place where the property is situated. The question was whether certain property was to be classified as moveable or immoveable. The property in question was a block of shares in a British railway company, but the matter was complicated because the deceased had inherited this property under the will of an aunt who had left land under a settlement. These shares had been acquired by the sale of some of the settled land, and the Settled Land Act, 1882, provided that securities which are invested in capital money derived from the sale of settled land should, for the purposes of transmission and devolution, be considered as land. The first question, therefore, was what law was to be applied to determine whether these shares should be considered to be moveable or immoveable property, and Morton J. held that this was the *lex situs*. In so doing he merely followed an earlier case and did not enter into any consideration as to whether any distinction was to be made according to the nature of the property (viz. interest in land, tangibles or other intangible property) under consideration. As Mr. Robertson points out in his book (page 190, etc.) the principle of the application of the *lex situs* to determine this question is one which is generally approved by judgments and writers, but he goes on to say that the application of the *lex situs* has more obvious justification in the case of interests in land and perhaps in the case of tangible property, than it has in the case of intangible property other than interests in land. In this last class of case, a *situs* has to be attributed to the intangible artificially (as indeed has frequently to be done for other purposes), and one is left with the question: what law is to be applied to determine the *situs* of the intangible? Further, shares and debentures in a company may be considered as being tangible property represented by the actual certificates or as more in the nature of a chose in action against the company, and therefore intangible. There is no indication in the judgment in this case whether these shares were regarded as tangible or intangible, since the judge simply held that the *lex situs* applied to determine their character and that they were situated in England. Having held therefore that English law applied to determine their character, he held that they must be regarded as immoveable property because of the above-mentioned provision in the Settled Land Act. There is only one other point to be mentioned, namely, that it was again pointed out in this case that the classification of property into moveable and immoveable is quite a different thing from its classification into real and personal. The former classification is one which is applicable for the purposes of the conflict of laws and the latter only applicable for quite other purposes of internal law. Consequently, doctrines which apply with regard to the question of real or personal property (such as the equitable doctrine of conversion) are irrelevant when the question is whether property is moveable or immoveable.

Case No. 13. In *Galene* v. *Galene* (55 T.L.R. 505) a husband sought from the English courts a declaration of the nullity of his marriage. The marriage had been celebrated in London in 1921; the husband was of French nationality and domicile. The wife would appear from her name to be of French nationality, but the facts with regard to her are not stated in the report. The husband was aged twenty-one and the wife twenty-three at the time of the ceremony. The husband returned to France in 1922, and shortly afterwards his father instituted proceedings for nullity of marriage in France, and in 1923 the competent French court declared that the form of marriage was null and void by reason of (*a*) non-publication of banns in France in contravention of Article 63 of the Civil Code; (*b*) there being no consent of the husband's father; (*c*) failure to record the marriage in the French register of civil status in contravention of Article 121 of the Civil Code. The husband sought for a declaration of nullity from the English courts on the ground that the marriage had been declared void by the courts of France, which were the courts of the domicile. The declaration asked for was granted by Henn Collins J. It should be noted that the English courts, on the basis of a decree of the courts of the domicile, declared void a marriage which had been celebrated in England, although the grounds on which the French court had proceeded may have been insufficient to render the marriage void in English law. This decision follows expressly the decision in the case of *de Massa* v. *de Massa*, a case which was reported only in *The Times Law Reports*, but is fully considered both by Dr. Cheshire (*Private International Law*, second edition, page 352) and in the *B.Y.B.* for 1932, page 169. This case therefore is a confirmation of this important decision, which, as Dr. Cheshire observed, carries to its logical conclusion the development of the supremacy of the personal law begun in *Salvesen's* case ([1927] A.C. 641, and *B.Y.B.*, 1928, 126, 169 and 181). This decision is therefore to be welcomed.

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[1] *Characterization in the Conflict of Laws* (1940). See below, 257.

Case No. 14. *In re B.'s Settlement* (55, T.L.R. 30) is a case which deals with the guardianship of a child of foreign nationality domiciled abroad. It may be recalled that the English courts claim jurisdiction to appoint guardians not merely where the child is domiciled in England, but also in two other cases:

(*a*) where the child though a foreigner by nationality or domicile is actually present in England; and

(*b*) where the child though absent from the country is a British subject.[1]

In this case the child was the eleven-years-old son of a father of Belgian nationality and domicile who had been made a ward of the court in England; the mother was English before her marriage in 1924. In 1934 the mother obtained a divorce in Belgium from her husband, and this judgment was reversed later, whereupon the father, under the law of Belgium, became sole guardian of the child and entitled to custody. The mother visited Belgium in 1937 and brought the child back to England with her, and the father started divorce proceedings in Belgium. In October 1937 the Belgian court made an order directing the mother to return the infant to the father, which the mother did not obey. The father now applied to the English courts for an order that the child should be delivered to his custody to be taken to Belgium. The child had, at the date of this application, been living in England and going to school there for two years. The judge, Morton J., held that Section 1 of the Guardianship of Infants Act, 1925, which says, "Where in any proceeding the custody of an infant is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any point of view the claim of the father, or any right at common law possessed by the father in respect of such custody, is superior to that of the mother or the claim of the mother is superior to that of the father" applied to every application to the custody of an infant which English courts had jurisdiction to entertain, whatever the nationality or whatever the domicile of the infant, and was a mandatory provision requiring the court to make the interests of the child the deciding factor in every case. Also that in the circumstances of the present case, it was in the interests of the child that he should remain at school in England in the custody of his mother for a further period. The judge distinguished two old English cases, *Nugent's* case (1866 L.R. II Eq. 704) and *Lousada's* case (1870, 18 W.R. 425), where the English court had awarded custody to the foreign guardian of a child who had been brought to England, partly on the ground that the Act of 1925 was not in force at that time. It is perhaps somewhat strange that the much more recent case of *Monaco* v. *Monaco* (157 T.L.R. 231, see *B.Y.B.*, 1938, p. 251), where a similar decision was made after the Act of 1925, was not discussed, nor was the Scottish case of *Rudoyevitch* (1930 S.C. 619) (see *B.Y.B.*, 1933, p. 200) mentioned. However, the position is not that the English courts did not recognize the rights of the foreign parent or guardian; on the contrary they recognize the guardian by the law of the domicile on exactly the same footing as they recognize the guardian deriving his title from English internal law. Consequently, the foreign guardian may have his rights of guardianship overridden in the interests of the child in the same way, but only in the same way, as the English guardian may have. In other words, the Act of 1925 is regarded, to use French terminology, by the English courts as a primary provision of *ordre public international* which overrides, where it applies, the English conflict rule and rights under the applicable foreign law. Up to this case, however, there does not seem to have been any provision as regards the application to the Act of 1925 of children of foreign domicile.

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[1] One would suppose that this should be "is domiciled in England", but the rule is generally stated in this way and, if it is correct, it is an exception to the otherwise almost invariable rule that in England the domicile and not nationality is the criterion for personal status. It may be a relic of the time when the rule had not become defined.

Case No. 15. It was stated above that the English courts claim jurisdiction to appoint guardians for any children who are present in England, whatever their nationality or domicile. This point is further illustrated by the case of "*In the matter of D. Infants*" (59 T.L.R. 354) where the English courts appointed guardians for German Jewish refugee children who had been brought to England to escape Nazi persecution in Germany. The parents of these children were still in Germany or Italy. The case further served to make clear a point which had in fact already been decided, that the jurisdiction to appoint guardians for foreign children in no way depended upon their possession of any property situated in England.

Case No. 16. The case *in re Paine* (55 T.L.R. 1043) deserves more attention than it has received. The question was whether certain persons were entitled to receive certain property under the will of a deceased person whose estate was being administered in the English courts, and this question turned on whether these persons were or were not legitimate. They were the offspring of a marriage celebrated in 1875 in Germany between a German national domiciled in Germany and an English woman domiciled in the United Kingdom. The English woman was the sister of the deceased wife of the husband, and at that time marriage with a deceased wife's sister was prohibited in England by statute. The marriage was valid by the law of Germany, which was the law of the place of celebration, the law of the domicile of the husband and also the law of the matrimonial domicile. Bennett J. apparently assumed that the question must depend on whether the children were the offspring of a marriage which must be recognized as valid by the English courts. But it is submitted that this is wrong, and he should have considered whether the children were legitimate by the law of their father's domicile at the date of their birth (*vide* Cheshire, *Private International Law*, 2nd edition, p. 376, and cases there cited). Proceeding, however, on this basis he held that the marriage must be regarded as invalid in English law and apparently considered the matter fairly free from doubt as being covered by the old case of *Mette* v. *Mette* (1 S.W. and T.R. 417). Now the *Mette* case was the same as the present case, but with one possibly very important difference which was not referred to. The *Mette* case also dealt with the marriage of a deceased wife's sister celebrated in Germany where one of the parties was domiciled in Germany, and one in England. But in the *Mette* case it was the husband who was domiciled in

England and England was the matrimonial domicile. Bennett J. treated the *Mette* case as an authority for a rule which is stated both in Dicey and in Westlake as a rule of English conflict of laws, that, in order that a marriage should be valid, both of the parties must have the capacity to contract that particular marriage by the law of their respective domiciles, and also for the view that the statute prohibiting marriage with a deceased wife's sister must be regarded (and no doubt rightly) as being a statute which governed capacity to marry. But as Cheshire very cogently argues (*Private International Law*, 2nd edition, pp. 218–28), the best way of reconciling all the English cases, as well as the best way to arrive at a logical and satisfactory rule, is to say that both parties must possess the capacity to contract this marriage by the law of the matrimonial domicile. The *Mette* case is consistent with Dr. Cheshire's suggested rule, but the present case is not, and it does not appear from the report that the view of the cases expressed by Dr. Cheshire was ever brought to the attention of the judge. This is unfortunate and it now appears that unless and until the same point comes before a higher court, it is not possible to say that the rule as framed by Dr. Cheshire is the rule recognized in the English courts, and we remain with the rule as stated by Westlake and Dicey, with its illogical exception, applying where a marriage is celebrated in England and one of the parties is domiciled in England and the marriage is good by English law.

Dr. Cheshire also brings out another point, namely, that it is essential for the validity of the marriage that it should be valid by the law of the country in which it is celebrated and that this rule should not be regarded as being confined to the forms of a marriage, but should also operate to invalidate a marriage, which the law of the place of celebration forbids to be celebrated, on grounds other than matters of form. Thus, though there does not appear to be any actual decision on the point, it was probably forbidden by English law to celebrate a marriage with the deceased wife's sister in England wherever the parties were domiciled. That is to say, that the statute may be regarded as not merely regulating the capacity to marry of persons whose capacity is regulated by English law, but as also regulating what marriages should not be celebrated in England. A similar point arises, as pointed out in the *Year Book*, with regard to a much more recent United Kingdom statute prohibiting marriages of persons under the age of sixteen.

Finally it is perhaps just worth while noting that when one looks at the old case of *Mette* v. *Mette* and the case of *Brook* v. *Brook*, on which it is apparently based, one finds that at that date the English courts were not clear whether capacity to marry was governed (at any rate so far as British subjects were concerned) by the law of the nationality or the law of the domicile,[1] and one finds it being discussed whether it made any difference in the *Mette* case that the British subject domiciled in England had only acquired British nationality by naturalization. Similarly it seems to have still been open for discussion at that time whether, supposing domicile was the governing factor, it made any difference whether the person had had a British domicile of origin or whether he had only acquired later a British domicile of choice. It is not safe to rely, in Private International Law matters, too much on old cases. In any event, it would seem that this case cannot have been well argued for the claimants.

Case No. 17. We have just been considering a case of legitimacy where the question was whether the persons concerned had been born legitimate.

The case of *In re Luck* (55 T.L.R. 333, Farwell J. and 915 C.A.) is an important and interesting case on the English conflict rule applicable to determine questions of legitimation. Before dealing with the case it is convenient to recall that, according to the prevalent view, the English rule is that legitimacy is a question of personal status and as such determined by the law of the domicile, but in many of the cases it is not expressed clearly whether this means the law of the domicile of the person whose legitimacy is in question or of the domicile of the (putative) father. However, a close examination of the cases seemed to show that where the question to be decided was whether X. was born legitimate, the law applicable was the law of the putative father's domicile at the time of the birth. There remains the question of legitimation of an originally illegitimate person. All the English cases dealt with legitimation *per subsequens matrimonium*. Under English common law legitimation *per subsequens matrimonium* was unknown and therefore, where the domicile of the father was English, legitimation could not take place. On the other hand, the conflict rule which the English courts had evolved with regard to legitimation under foreign law was that a person would be recognized as legitimated under a foreign law, if the legitimation was valid by the law of the father's domicile at the date of the birth and at the date of the subsequent marriage. It was said that the law of the father's domicile at the date of the birth fixed the capacity of the child to be legitimated. As Fry L.J. said in the case of *In re Grove* (45 Ch.D., p. 238), "An illegitimate child takes its domicile and status from its mother, but takes the potentiality of changing its status from the putative father." Fry L.J. did not here mean that the question whether the child was illegitimate was to be determined by reference to the domicile of the mother, but that once it was established that the child was illegitimate, it had the domicile of the mother, and the legal consequences which flow from the status of illegitimacy were to be ascertained by reference to the domicile of the mother. The Legitimacy Act of 1926 introduced two important changes into English law. For the first time legitimation was introduced into English internal law and it was provided that where the parents of an illegitimate person married, the marriage should legitimate that person as from the date of the marriage, if the father was domiciled in England at the date of the marriage, but then went on to provide that no legitimation should take place if at the time of the birth either parent was married to a third person. Then in Section 8, the Act changed the conflict rule with regard to the recognition of legitimation by foreign law by providing that where the parents of an illegitimate person married and the father was at the time of the marriage domiciled in a foreign country, by the law of which legitimation took place on account of the marriage, then the person should be recognized as legitimated in England as from the date of the marriage. Section 8 of the Act, therefore, abolished from the English conflict rule the requirement that legitimation should have been possible under the law of the father's domicile at the time of the birth. As already stated, the only type of legitimation which had hitherto come before the English courts was legitimation *per subsequens matrimonium*. Here, for the first time, the English courts had to deal with another type of legitimation, which the law of California recognized, namely legitimation by the father adopting his illegitimate son, and recognizing him as his without marrying the mother, and indeed when he was married to another person. The novelty of the point made the case a difficult one, and therefore neither Section 8 of the Legitimacy Act nor the old common law cases, dealing with legitimation by subsequent marriage, were applicable, and we should not have referred to them if the court had not in its decision considered (no doubt rightly) that the rules with regard to these two sorts of legitimation should be as far as possible similar. Nevertheless, for reasons which are given below, the decision is not altogether satisfactory and there was a division of judicial opinion between a majority of the Court of Appeal on the one hand and the third member of the Court of Appeal and the judge of first instance on the other.

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[1] Cf. the footnote to Case No. 14 above.

The facts of the case were as follows: The father (who died in 1896) of F.C.L. left certain trust funds; the distribution of one part of these was governed by his will and of the other part by the terms of his marriage settlement dated 1867. The trust funds left by the will gave an equal life interest to his children, including F.C.L., and then provided for the division of the capital amongst the children of his children *per stirpes*. The marriage settlement funds devolved in the same way, but there was the additional requirement that the grandchildren could only take if they were living within twenty-one years after the death of the settler, i.e. in the event, within twenty-one years of 1896, that is to say, in 1917. F.C.L. had two children born of his marriage in 1893 with X., and a third child, David, who was born in 1906 in California of M.A.C., a spinster with whom F.C.L. was then living. In 1922 the marriage of F.C.L. and X. was dissolved by the Californian court, and F.C.L. then married one A.H., who was not the mother of David. By a document, dated 1925, F.C.L., with the formal assent of his second wife, acknowledged David as his son and adopted him, and under the law of California the effect of this document was that David was to be deemed for all purposes legitimate as from the time of his birth. F.C.L. died in 1938 and the question was whether David could share as a child of F.C.L. in the trust funds. It became necessary to determine the domicile of F.C.L. at different dates, and the facts were that he was born a British subject with an English domicile of origin; soon after his marriage with X. he went abroad both to New York and Europe and arrived in California in 1906. In 1907 he made an agreement with X. to make financial provision for her in which he described himself as being in business in the United States and out of England for some years. In the same year, 1907, he obtained a house in California and thereafter lived there for most of his life.

Held by Farwell J.:

(1) F.C.L. had acquired a domicile in California before 1925.

(2) He had not acquired a domicile in California in 1906 when David was born.

(3) The construction and application of the trusts of the will and of the marriage settlement were governed by English law and David could not take under these trusts unless he was to be regarded as legitimate.

(4) According to the English conflict rule, legitimacy is a matter of personal status and governed by the law of the domicile (Farwell J. does not make it quite clear whether he refers to the domicile of the father or the son).

(5) David was domiciled in California, which was also the domicile of F.C.L. from some time before 1925, and by the law of California he was legitimated as from the date of his birth; therefore he should be recognized as legitimate in England, and there is nothing in English public policy to prevent the recognition of his legitimacy.

(6) The old cases (*In re Wright's Trust*, 1952, 2 K. and J. 595, and *Udny* v. *Udny*, I, H.L. 441) relating to legitimation *per subsequens matrimonium* and requiring that a person should be capable of being legitimated by the law of the father's domicile at the time of the birth did not apply to the present case, which was legitimation by adoption. Under the law of California, which is the law of David's domicile and that of his father before 1925, David had become legitimate as from the date of his birth and there was nothing to prevent English law from recognizing that he had so become legitimate as from the date of his birth.

(7) It was true that in order to participate in the marriage settlement funds David must not only be a legitimate son of F.C.L., but also alive in 1917. He was alive then, but not legitimate, and if the funds had been distributed before 1925 he would have had no claim, but as the court was distributing the funds in 1940, this was not material, the court must distribute them to those persons who have a valid claim in 1940.

In the Court of Appeal this decision was reversed by a majority decision of Greene M.R. and Luxmore L.J., and Scott L.J. dissented. Held by the majority of the Court of Appeal:

(*a*) the view of Farwell J. on points (1), (2) and (3) above was correct.

(*b*) up till 1925 David was illegitimate and up to that date his domicile was that of his mother (M.A.C.).

(*c*) Assuming that English law would recognize a change in the status of David effected by Californian law when he was domiciled in California, it was equally true that English law would not recognize a change in his status effected by the law of California when he was not domiciled there (unless, of course, such change were recognized by the law of the domicile). Consequently it was doubtful (but they did not think it necessary to decide this) if the law of California could effect a change in the status of David dating back to a time before he became domiciled there. For the reasons given in (*b*) David could not be regarded as having been domiciled in California all his life, but no attempt was made to decide whether M.A.C. and therefore David had become domiciled in California before 1917.

(*d*) In cases of recognition of legitimation *per subsequens matrimonium*, the common law rule required that the legitimation must be valid by the law of the father's domicile, both at the date of the birth and at the date of the marriage. Under statutory rule (Section 8 of the Act of 1926) the legitimation was recognized if valid by the law of the father's domicile at the date of the marriage only. But in this case it was provided that legitimation should only take place as from the date of the marriage.

(*e*) There were strong reasons for following as far as possible the same principles with regard to legitimation by adoption as with regard to legitimation *per subsequens matrimonium*, and therefore the old common law rule with regard to legitimation by subsequent marriage should be applied and David could not be recognized as being legitimated because the law of his father's domicile at the date of his birth was English, and according to English law at that date David was not born with the capacity of being legitimated.

The reasons why the decision of the majority of the Court of Appeal does not appear to be entirely satisfactory are, in the first place, that it was hardly necessary to go into the question of the domicile of David and his mother, seeing that the majority were to hold later that it was the domicile of the father which was really relevant. To go into this only served to continue the confusion on the question whether it was the father's or the child's domicile which was relevant, and in any case since there was no evidence whatever with regard to the domicile of M.A.C., it was not very satisfactory for the court to proceed upon two assumptions in regard to it entirely unsupported by evidence. In the second place, and more important, while the majority seem to have been right in saying that the same principles should be applied to legitimation by adoption and to legitimation *per subsequens matrimonium*, it is very difficult to see why they then went back to the old common law rules of *Udny* v. *Udny* and *in re Wright's Trust* which had been abrogated by statute in 1926.

(It is equally strange that Farwell J. and Scott L.J., who took a different view, expressing dislike in principle of the old common law rule and holding that it did not apply to legitimation by adoption, never commented on the fact that in any case it was now abolished by statute.)

It is surely not applying to legitimation by adoption the English conflict rule with regard to legitimation *per subsequens matrimonium* to introduce the requirement that the person must be capable of legitimation by the law of his father's domicile at the time of his birth, when this requirement had already been abolished by statute for legitimation *per subsequens matrimonium*. Surely the assimilation of the two classes of cases would have required the application of legitimation by adoption of the principles of Section 8 of the Act of 1926, i.e. the law of the father's domicile at the date of the birth is disregarded, and the act of adoption is assimilated to the marriage of the parents, and legitimation takes place as from the act of adoption, provided that the act of adoption produces legitimation by the law of the father's domicile at the time when the act of adoption takes place. And on this view, which we suggest to be really the best view, David would be recognized as having been legitimate only as from 1925, but not before, and therefore he would have been able to take under the trusts established by the will, but possibly would not have been able to take under the marriage settlement trusts, because he was not a legitimate child in 1917. This view, moreover, avoids the difficulty felt (and perhaps correctly) by the majority (*vide* (*c*) above) about recognizing the power of the law of California to antedate the legitimacy to a time before the date when California became the domicile (of the father or the son).

Scott L.J. and Farwell J. took a different line, namely, that legitimacy was a matter of personal status and the characteristic of matters of personal status in private international law is its universality. (It is Scott L.J. who develops this argument fully in a judgment of almost record length.) Universality means that the status is determined by the personal law (domicile or nationality as the case may be) and that the incidents of the status so ascertained are recognized with all their effects everywhere save and in so far as any definite and positive rule of some other applicable law forbids. They therefore hold that as David had become under the law of the domicile in 1925 legitimate as from the date of his birth, he must be so recognized as legitimate, as from the date of his birth, in England. Neither, however, of these two judges makes it clear whether it is the father's domicile or the child's domicile which is the relevant one. Scott L.J. is at some pains to show that the law of David's domicile was in 1925 (and before that) in fact the same as his father's. But at any rate both these judges make it clear that in the case of legitimation it is the law of the domicile at the time when the legitimation takes place which is relevant. Upon their view therefore the legitimation dated back to the birth, and therefore the result in their view is different in the case of legitimation by adoption and legitimation *per subsequens matrimonium*, and this is an objection to their view, seeing that, as the majority of the Court of Appeal showed, there are good reasons for applying as far as possible the same principle to the two kinds of legitimation.

In conclusion, it may be well to make it clear that, if the English conflict rule is (as we think it is):

(*a*) (pace *In re Paine*) legitimacy at birth is governed by the law of the (putative) father's domicile at the date of the birth;

(*b*) subsequent legitimation (whether *per subsequens matrimonium* or [pace the majority of the Court of Appeal in *In re Luck*] by adoption or otherwise) is governed by the law of the father's domicile at the date of the act of legitimation and operates (pace Farwell J. and Scott L.J.) as from the date of this only, whatever that law may say;

nevertheless this does not mean that the English courts must always apply this rule whenever a case of legitimacy or legitimation presents itself. On the contrary, they must only apply this rule when the English conflict rule is applicable, and sometimes they have to apply a foreign conflict rule to determine legitimacy, viz., when they are distributing the estate of a person domiciled abroad, and apply the law of that foreign country and its conflict rules, i.e. apply whatever law the courts of the foreign domicile would apply if the case was before them.

This remark leads to our next group of cases.

Section V

Here we have three cases whose common feature is that they all deal with *renvoi* in its widest and inaccurate sense. The first two are personal status cases and turn on the English rule that where, in matters of personal status, a matter is referred to the personal law, the reference is to the *whole* of the personal law, including its conflict rules, which may involve a further reference onwards or backwards (*In re O'Keefe* and *Kotia* v. *Nahas*). The third is a novel and we suggest mistaken application by the Privy Council of the rule that the reference to a foreign law includes its conflict rules to a contract case where the "proper law of contract" has to be applied. This third case (*Vita Food Products* v. *Unus Shipping Co.*) also involves the "Hague rules" relating to Bills of Lading, and for this reason a fourth case is included in this group because it also relates to this subject (*The Ocean S/S Co. Ltd.* v. *Queensland Wheat Board*).

Case No. 18. The case of *In re O'Keefe* (56 T.L.R. 204) decides a point of considerable importance. The decision was that the law of the nationality of a British subject, when that law has to be applied to determine questions of personal status in the courts, is the law of that British territory with which the person concerned is most closely connected. If the person was domiciled in any British territory, it is the law of that territory, but if he was not domiciled in any British territory, then it is the law of that British territory (if any) in which the person had his domicile of origin. The facts were that the deceased was a British subject by birth in India of a father, born in (what is now) Eire, and domiciled there. The deceased derived from her father an Irish domicile of origin, but she died domiciled in Italy, leaving property in the United Kingdom, and the question was what law governed the distribution of her property. The rule the English courts apply is that this matter is governed by the law of the domicile, viz., Italy, but that this means that the property is to be distributed in accordance with the law which the Italian courts would have applied if the case came before them. The judge, in holding that this was the effect of the English rule, followed the cases of *In re Ross* ([1930] 1 Ch. 377) and *In re Askew* ([1932] Ch. 259) and gave as the effect of these cases precisely the explanation of the English rule given in the *Year Book* for 1931 at page 175. The Italian courts apply the law of the nationality, and the evidence was that this meant, where there is more than one law of the State of which the person was a national, the law of the territory to which that person belonged, and upon this evidence the judge (Crossman J.) held on the reasoning given above that, in the case in point, the law of Eire must be applied, although the deceased was not a citizen of Eire. The judge observed that in urging this conclusion his view was in accordance with that given in Cheshire (*Private International Law*, 2nd edition, at p. 162), and Dr. Cheshire, in this passage of his book, follows, as his footnotes show, the view expressed in the *Year Book* for 1931 at page 176.

Case No. 19. *Kotia* v. *Nahas* (57, T.L.R. 619) is another case dealing with *renvoi* in connexion with the distribution of the estate of a deceased person. It came to the Privy Council on appeal from Palestine. Now Palestine differs from almost every other country in having a legislative provision (namely, Section 4 (iii) of the Palestine Succession Order, 1923) which is clearly intended to deal with the matter and to provide for the application by the courts of Palestine of the principle of *renvoi* in its strict sense. The difficulty arose because the wording of the provision uses the expression "law" without saying whether this means the whole law, including the conflict rules of the country in question, or whether it means the internal law; or, to put the matter in another way, when the reference is made to the national law of the deceased, whether this means the law which the courts of the deceased's country would apply supposing him to be domiciled there and his property situated there, or does it mean that the case is to be dealt with as these national courts would have dealt with it, if the actual case had come before them. The difficulty is increased because in order to give effect to the plain intention of the provision, which was to adopt the *renvoi* principle, and at the same time avoid what sometimes is called "the *circulus inextricabilis*", it is necessary sometimes to construe the word "law" as meaning the whole law of the country in question and in other cases to construe it as meaning only the *internal* law. The provision is worded as follows:

> "Where the deceased was either a foreigner . . . the following rules are applied:
>
> "(*a*) Mulk land and moveables of the deceased shall be distributed in accordance with the national law (1) of the deceased; . . .
>
> "(*c*) Where the national law (2) imports the law of the domicile (3) . . . or the law of a situation of an immoveable (4), the law so imported shall be implied:
>
> "Provided that if the national law (5) imports the law of the domicile (6), and the law provides no rule applicable to the person concerned, the law to be applied shall be his national law (7)."

We have inserted numbers after each of the cases where the word "law" is referred to. The Privy Council's decision amounts to this: that in cases (1), (2) and (3), the words "national law" or "law of the domicile" mean the whole of the law of the country in question, including its conflict rules; but that in case (4) the law of the situation of the immoveable means the internal law of the country where the immoveable is situated. It might also be added, though that was unnecessary for the purposes of the decision in the case, that the words "national law" in place (5) and the "law of the domicile" in place (6) mean the whole law, whereas the words "national law" in place (7) mean the internal law. Unless one attributes these different meanings to the same expression, the intended effect of this otherwise carefully drafted provision is frustrated.

The next case is decision of the Privy Council which has been subjected to a good deal of criticism by writers. It will be convenient first to give a rather full summary of the case and consider later whether this criticism is justified.

Case No. 20.

Vita Food Products Incorporated v. *Unus Shipping Company* ([1939] A.C. 277 [P.C.]).

The defendants were the owners of the vessel *Hurry On* registered in Nova Scotia; the plaintiffs were the consignees of a cargo of herrings shipped on the *Hurry On* at a port in Newfoundland for carriage to New York in 1935. The *Hurry On* ran aground in Nova Scotia during the voyage through the negligence of the master. The herrings were unloaded and forwarded to New York in a damaged condition and the plaintiffs sued the shipowners for damage in the courts of Nova Scotia. The plaintiffs had bought the herrings in Newfoundland from B. and it was held that the plaintiffs were the owners of the herrings at all material times. Bs/L. were issued in Newfoundland by S. as agent for the vessel and signed by P. supercargo on behalf of the vessel. These bills were made out to the order of a bank and endorsed "Notify Vita Food Products, New York, or their assignees". There was a clause to the effect that in accepting the b/l., the shipper, consignees and holders of the b/l. was bound by it in the same manner as if they had signed it. Under the terms of the b/l., the shipowners were not liable for damage due to the negligence of the master. There was, however, in force in Newfoundland an Act called the Carriage by Sea Act, 1932, which incorporated the Hague Rules (i.e. the rules laid down in the Convention signed at Brussels in 1924 for the Unification of Certain Rules relating to bs/l. This Convention was one of the results of the Maritime Law Conferences held at The Hague in 1922 and 1923. It had been accepted by the Government of the United Kingdom and given the force of law in the United Kingdom by the Carriage of Goods by Sea Act, 1924. It had been extended to Newfoundland, and the Newfoundland Act of 1932 was passed to give effect to the Convention there). This Act of 1932 provided:

- (i) That the Hague Rules should apply to every b/l. issued for the carriage of goods by sea from a port in Newfoundland;
- (ii) That every b/l. issued in Newfoundland should contain an express statement that its provisions should have effect subject to the Hague Rules;
- (iii) That the Newfoundland courts had jurisdiction to determine claims for damage in respect of shipments from Newfoundland, notwithstanding any clause in the b/l. to the contrary.

The b/l., in this case, did not have this express statement. (Owing to some error S. produced an old form of b/l., which was, in 1935, only ordinarily used by him for shipments made at ports outside Newfoundland). Instead it provided:

(1) In the case of shipments from the United States, the United States Harter Act should apply;

(2) For all other cases the b/l. was subject to the Canadian Water Carriage Act of 1910 and incorporated the clause of that Act making void provisions in the b/l. exempting the shipowner from liability otherwise than in accordance with the Canadian Act. (The Canadian Act, however, only applies to shipments made in Canada);

(3) That the contract was governed by English law. (The United Kingdom Carriage of Goods by Sea Act, 1924, which incorporated the Hague Rules, only applied to shipments from the United Kingdom.)

The Newfoundland Act and the Hague Rules made any clause in that b/l. exempting the shipowner from liability for negligence in certain cases void, but the shipowner would not have been liable under the Hague Rules in this case. But it was contended before the Court in Nova Scotia that, as the Act of 1932 had not been complied with, the b/l. was void and the shipowner was in the position of a common carrier and therefore liable.

Held by the Chief Justice of Nova Scotia:

(1) That the Newfoundland Act did not make the b/l. void, because the clause prescribed by the Act was not contained in it;

(2) That the bs/l. were effective documents, but the liability of the shipowner, as defined by the b/l., was subject to the Hague Rules;

(3) Under the Hague Rules the shipowner was not liable.

On appeal to the Supreme Court of Nova Scotia: *held*:

(*a*) The b/l. was made illegal and void by the Newfoundland Act because the prescribed clause was not included;

(*b*) Both parties were involved in the illegality and consequently the action failed whether framed in contract or in tort.

On appeal to the Privy Council *held*:

- (i) English law was the proper law of the contract because of the clause in the b/l. to that effect: the proper law is the law which the parties intended or are presumed to have intended to apply, and the parties could make English law the proper law of the contract, although the contract had no connexion with England;
- (ii) It was not inconsistent with (i) that the parties should also, as a matter of contract, incorporate for certain purposes the United States Harter Act and the Canadian Act of 1910;
- (iii) The proper law of the contract "fixes the interpretation and construction of its express terms and supplies the relevant background of

statutory or implied terms" (*s.c.* subject presumably to whatever the parties may have expressly provided as in (ii) above);[1]

(iv) English law, as the proper law of the contract, may (*a*) incorporate the law of other countries as part of the terms of the contract or (*b*) require other laws to be regarded in giving effect to the contract. In particular, English law (1) will not enforce performance of a contract contrary to the law of the place of performance; (2) will apply the law of the place of performance to regulate the incidents and mode of performance.[2]

(v) Since the proper law of the contract was English law, the English conflict rules must be applied to determine how the b/l. is affected by the failure to comply with the Newfoundland Act.[3]

(vi) It does not follow as a necessary consequence that because the b/l. was void or illegal by the Newfoundland law (the law of the place where the bill was issued and the contract made), a Nova Scotia court applying the proper law of the contract should regard the bills as void. In fact, under the English law as the proper law, the bills would not be regarded as void in these circumstances. (*In re Missouri S.S. Company*, 1889, 42 Ch.D. 321).[3]

(vii) In any case, the law of Newfoundland did not make the b/l. null and void because the clause referring to the Act of 1932 was not included. It did, however, import the Hague Rules.

(viii) The bs/l. were valid documents and the shipowner was not liable.

The Privy Council based its decision on the bs/l. only. On the reasoning of the judgment, it would appear that the Privy Council thought that the Hague Rules had not been imported into the contract. The result, however, would have been the same in either case. Consequently, it is not the actual decision which has provoked criticism, but the grounds upon which it is based. In view of the finding (point (vii) above) that the bills were not invalidated by Newfoundland law and of the fact that, so far as the present case was concerned, both the bs/l. and the Hague Rules produced the same result, it does not appear to have been necessary for the purposes of the decision for the judgment to contain all the rulings on points of conflict of laws, which had provoked criticism. The Board presumably thought it desirable to do so, to correct the views expressed in the courts below and perhaps also to express their disapproval of the decision of the English Court of Appeal in the case of *The Torni*, which was discussed in the 1933 number of the *Year Book*, on page 193. *The Torni* was a decision on extremely similar facts, substituting Palestine and the Palestine Ordinance for Newfoundland and the Newfoundland Act. There was one difference, however, mainly that in *The Torni* the shipowner was liable, if the Hague Rules applied, and not liable if the bs/l. only applied.

It seems to the present writer that the criticism of the Privy Council's judgment in this case is not unjustified. There seems no reason to take exception to points Nos. (i), (ii), and (iii) in this judgment as summarized above, except that (iii) does not exhaust the rôle of the proper law (*vide* the footnote to (iii)). Point No. (v), however, and also point No. (iv) do call for examination. Here the Privy Council is saying that the court should (*a*) discover the proper law of the contract and then (*b*) apply to the case the conflict rules which form part of that law. It is submitted that (*b*) is an entirely new proposition for which there is really no authority whatever in other English cases. The conflict rules to be applied in any case are those of the *forum* (in this case Nova Scotia) and the "proper law of the contract" rule is itself merely one of many conflict rules. It is true that in the case of *some* English conflict rules (and it was assumed that the rules of Nova Scotia were the same as those of English law), namely, those which require the application of the personal law (domicile) in matters of personal status, the reference to the foreign law is regarded as being on reference to the whole of the foreign law in question, including its rules of conflict with regard to the law governing personal status, but even here *not* its *other* conflict rules. It is sometimes said rather loosely in those cases that the English court must decide the case in exactly the same manner as the foreign court would have done. But has this principle been extended to other English conflict rules, and has an English court ever said when it deals with a contract, whose proper law is French, that it must decide the case in the same manner as a French court would have done? It seems to the present writer, as to other writers who have criticized this decision, that there is no authority for interpreting the "proper law of the contract" rule in this way and that there are grave disadvantages in so interpreting it, especially if the proper law can be anything which the parties may choose to say and therefore not necessarily the law of the country with which the contract has the most real connexion. In fact, no court could possibly lay aside all its own conflict rules directly it found that the contract had a foreign proper law, and no case or writer that we have been able to find even suggests that an English court would do so. Perhaps the Privy Council did not mean to go so far as this, though the judgment reads as if it did. In any case, it is submitted it is not practicable to retain (*a*) the useful principle of the proper law of the contract and (*b*) the principle that the parties can choose their own proper law, unless the scope of the proper law is confined to (iii) in the Privy Council judgment—with the extension indicated in the footnote to that point—coupled with the subordinate rule that, where a contract is to be performed in a country other than that of its proper law, it must be regarded as having a secondary proper law applicable to govern the mode of performance and what constitutes a discharge. In the *Year Book* for 1939 at page 158 there is a full discussion of this extension and subordinate rule as the only method of reconciling the decisions of the House of Lords and Privy Council in the last few years.

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[1] The proper law may also have a wider effect: it may render illegal or void one or more contractual provisions and substitute one obligation for another (i.e. reduce rate of interest or extend the date for performance, etc.), *vide* the *B.Y.B.* for 1939, at p. 158.

[2] For reasons given below this is not regarded as the usual or correct method of stating the position, but it was pointed out in the *B.Y.B.* for 1939 after a full review of the cases, that a contract may have a secondary proper law and that there is a strong presumption that, where a contract is to be performed in a country other than of its proper law, the *lex loci solutionis* is a secondary proper law applicable to determine the method of performance and what is a discharge.

[3] *Vide* below for discussion of (v) and (vi).

Point No. (vi) is also somewhat doubtful, even if it is expressed (as we think it should be) not as an effect of the "proper law" but of a conflict rule of the forum. Admittedly there are a number of English cases where the courts have upheld and enforced contracts which were void by the law of the place where the contract was made and have done so in the case of bs/l. void in the country where they were issued and the goods were shipped. On the other hand, there are other cases, where the English courts have said that a contract, void by the law of the country where it is made, is void everywhere, and that a contract which is illegal by the law of the country where it is made should not be enforced anywhere. (*Vide*, for instance, *In re Anziani* [1930] 1 Ch. 107 and *B.Y.B.*, 1931, p. 181, and *Republica de Guatemala* v. *Nunez*, *B.Y.B.*, 1928, p. 171.)

It is not easy to reconcile the cases and successfully to distinguish two classes of cases, subject to different rules. *The Torni* was a case where the English Court of Appeal held that the parties could not, by saying their contract was governed by English law, escape imperative provisions of Palestine law in respect of bs/l. issued there and goods shipped in Palestine; and (as Scrutton L.J. said in the case), if a different view was taken, the whole object of the Brussels Convention, which had been adopted in English law as well as in the law of Palestine, could be defeated by shipowners inserting in their contracts a clause to the effect that the contract should be construed, not according to the law of the country where the contract was made, but according to that of the country where the ship was going, although both countries were parties to the Convention; and that this was an absurd and regrettable result and one which it must be a matter of public policy to avoid. *A fortiori*, of course, if the parties provide that the contract is governed by the law of some country which has no connexion with the contract at all. Even if it is right, as a rule, to limit severely the application of the *lex loci contractus* in commercial cases, there were surely good reasons for not doing so in this case and in that of *The Torni*.

Case No. 21. The decision of the Court of Appeal in the *Ocean Steamship Co. Ltd.* v. *Queensland State Wheat Board* (57 T.L.R. 191) is another case connected with the application of the Hague Rules. The Hague Rules were adopted in Australia in the Australian Sea Carriage of Goods Act, 1924, an Act which also proceeds on the principle of making the Australian Act, imposing the Hague Rules, applicable to all shipments from Australia whatever contract the parties may make in their shipping documents. In this case the shipowners, an English company, were suing the owners of cargoes shipped on their ship at the port of Brisbane, because the cargo consisted of weevil-infested wheat which had infected other cargo and involved the shipowners in loss because they had to compensate the owners of the other cargo. The defendants were not carrying on business in the United Kingdom and had no office there, and consequently the plaintiffs could only sue them in the English courts if the case came within one of the Rules providing for service within the jurisdiction. The only one of these rules which might possibly be applicable was the rule which provided for service out of the jurisdiction where the claim was based on a contract governed by English law. *Prima facie* it seemed as if the plaintiffs could bring themselves within this rule because clause 6 of the bills of lading said that the contract, evidenced by the bill of lading, should be governed by English law. However, the first clause of the bill of lading provided that all the terms, etc., of the Australian Sea Carriage of Goods Act, 1924, were to apply to the contract contained in the bill of lading . . . and that if anything in the bill of lading was inconsistent with the Act, it should, to the extent of such inconsistency, be null and void. In Section 9 of the Australian Act it is said that any parties to any bill of lading relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, i.e. Australian law, and any stipulation to the contrary shall be null and void. For this reason it was held that Section 9 of the Australian Act, imported by clause 1, was inconsistent with clause 6 and therefore rendered the latter null and void, and therefore this contract was not one covered by English law but by Australian law.

Section VI

In this short section we give three cases all relating to claims in the courts of England or Gibraltar for debts in foreign currency.

Cases Nos. 22 *and* 23. *Madeline Vionnet & Cie* v. *Wills* ([1940] 1 K.B. 72) and *Graumann* v. *Treitel* (162 L.T. 383) are both decisions on a claim in the English courts for a debt in foreign currency. In both cases the debt was under a foreign contract and should have been paid in a foreign country, but it would seem that the decision would have been the same if it had been an English contract providing for the payment of foreign currency in England. It may be recalled that, owing to a technical rule, the English courts cannot give judgment for a sum in foreign currency and must therefore convert the claim into English money; also that an obligation to pay foreign currency is treated from the point of view of English law as an obligation to provide a commodity which is obtainable in England and has a market price (i.e. rate of exchange).[1] The question at issue in both cases was whether the rate of exchange to be taken for the conversion into sterling was that prevailing at the date when the debt should have been paid or that prevailing when the judgment was given. In fact, it had already been decided by decisions which were binding in the Court of Appeal, before which the first of these cases came, that the date to be taken was the date of the breach of contract, where the claim was one for damages for breach of contract, and, in the case of a claim for fixed and definite damage in tort, the date fixed for the determination of the damage; and, as the Court of Appeal said, the only question open for argument before them was whether any distinction could be drawn in principle between a claim for damages for breach of contract and a claim for non-payment of a contract debt; and it was held in both cases that there was no distinction and that the rate of exchange which should be adopted was that prevailing on the date of the breach of contract to pay. This was the only point in the first of the two cases, and the Court of Appeal have probably finally settled that the same rule applies to all cases of claims for foreign currency. Nevertheless, it is doubtful if the rule is the most equitable. The second case, which was before Atkinson J., contained some other points, and its effect can best be given by a short quotation from the head-note of the report:

> "The plaintiff and defendant, who were both German nationals, entered into an agreement in Berlin under which a sum of money in German currency became payable to the plaintiff by the defendant. At the date of payment both parties had left Germany and were domiciled in England. The money was not paid and the plaintiff sued to recover it.
>
> "The defendant contended, first, that his obligation was to pay in Berlin and that since neither party was domiciled in Germany, payment would be illegal according to German law; and, secondly, that an action to recover money payable abroad in foreign currency was one for damages for breach of contract and not to recover a debt, and that, since payment was unlawful by German law, there had been no breach of contract:
>
> "*Held*, first, that the English court had jurisdiction to try the action, since service of the writ had been effected in England; secondly, that payment was not unlawful by German law, since both parties were what German law described as currency foreigners, and the restrictions on payment only applied to transactions between currency inlanders and currency foreigners; thirdly, that the action was one to recover a debt and not for damages for breach of contract; and fourthly, that the plaintiff was entitled to recover a sum in sterling calculated at the current rate of exchange on the date when payment became due."

In connexion with the above cases about English judgments which relate to problems of foreign currency before the English courts, reference may be made to *Pyrmont* v. *Schott* (55 T.L.R. 178, *B.Y.B.* for 1939 at p. 161) and to *The Baarn* (*B.Y.B.* for 1935 at p. 209 and 1934 at p. 191). It would seem in fact that in *Pyrmont*'s case the Privy Council had already decided (on appeal from Gibraltar) the very point which was in issue in *The Madeline Vionnet* v. *Wills* about the date which should be taken to fix the rate of exchange when a claim was made for a debt in foreign currency. A later case before the Privy Council, also on appeal from Gibraltar, deals with the same problem, but in rather different circumstances.

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[1] Nevertheless this does not prevent an obligation to pay a sum in foreign currency (whether in England or abroad) being regarded as a debt for a fixed sum of money—so that interest can be claimed or a Bill of Exchange or a Promissory Note expressed in foreign money being regarded as a Bill of Exchange or Promissory Note (see, for instance, *Salem* v. *Khayat*, [1943] A.C. 507). P.C. on appeal from Palestine).

Case No. 24. *Marrache* v. *Ashton* (59 T.L.R. 142). In that case Marrache owed Ashton a certain sum in Spanish pesetas. Both parties were resident in Gibraltar. Gibraltar was the place of payment and the contract was governed by the law of Gibraltar. Marrache did not pay at the due date and Ashton sued him in the courts of Gibraltar. Ashton claimed £1,200, which was the equivalent of the debt in pesetas at a rate of exchange of 53 pesetas to the £, being the rate fixed officially by the Spanish Government for the exchange of currency at the frontier. After the action had been commenced Marrache tendered £458 which was the equivalent of the sum due in pesetas at 103 pesetas to the £, the rate of exchange at which peseta notes of the Bank of Spain could be bought in the market at Gibraltar at the time of the action. Since January 1939, Bank of Spain notes had become legal tender in Spain. Before that gold and silver coins were legal tender in Spain, and this change in Spanish law makes the difference between this case and the *Pyrmont* case referred to above. Under Spanish law the export of peseta notes of the Bank of Spain was prohibited, but this did not prevent there being a market in Gibraltar for these notes, which were freely bought and sold in Gibraltar without any infringement of the law of Gibraltar. It was held by the Privy Council:

(1) That Marrache's duty under the contract was to furnish the amount of pesetas in whatever was legal tender by the law of Spain, namely, in Bank of Spain notes.

(2) From the point of view of the law of Gibraltar which governed the contract, this was an application to furnish a commodity obtainable in the market at Gibraltar and for failure to fulfil his obligation Marrache was liable for damages and the measure of damage was the sum in sterling necessary to enable Ashton to buy in Gibraltar Bank of Spain peseta notes up to the contract amount.

(3) The official rate of exchange fixed by the Spanish Government for exchange at the frontier was irrelevant and so was the Spanish law prohibiting the export of peseta notes since this contract was governed by the law of Gibraltar and payment was to take place in Gibraltar. It had been agreed between the parties that the date which should be taken for ascertaining the rate of exchange should be the rate prevailing at the beginning of the action, and therefore this decision of the Privy Council based on the rate of exchange, prevailing at the beginning of the action, is not inconsistent with the cases referred to above which lay down the principle that the date for fixing the rate of exchange should be that prevailing when the payment was due under the contract.

Section VII

We conclude with three cases whose common feature is that they all relate to the question whether a person (or a company) is a British national in some sense or other. The first (*R.* v. *Kettner*) deals with the position of a Palestinian citizen. The two latter cases are both connected with Eire. *Murray* v. *Parkes* is concerned with the liability of a citizen of Eire to be conscripted for national service in the United Kingdom, and the *Hume Pipe* case with the question whether Eire is a British Dominion and whether an Irish company is a British company.

Case No. 25. *R.* v. *Kettner* (55, T.L.R. 449, and [1940] 1 K.B. 787) was a decision of the Court of Criminal Appeal. Kettner had been convicted of failing to obey two orders made with respect to him under the Aliens Order and sentenced to eleven days imprisonment and to deportation. Kettner appealed from this conviction on the ground that he was not an alien but a British subject. Kettner had been a former Turkish subject resident in Palestine and as such he had become a Palestinian citizen under the Palestine Citizenship Order in Council, 1925. He had come to England on a passport issued by the Government of Palestine.

It is convenient to explain here that the expression "nationals" (French *ressortissants*) means in relation to any State the whole class of persons who are entitled, when abroad, to the diplomatic protection of that State, and who have rights of citizenship in some portion of the territories of that State. British nationals fall into two large classes, (*a*) British subjects, (*b*) British protected persons, of whom there are about 100,000,000, namely, persons belonging to British protectorates, protected states, Indian native states, and British mandated territories. Though both classes of persons are British "nationals", it does not follow that all of them enjoy rights of citizenship in every British territory or that all of them enjoy rights of citizenship in the United Kingdom as the metropolitan territory. British protected persons, though British nationals, do not enjoy rights of citizenship in the United Kingdom, and are in the United Kingdom aliens from the point of view of English municipal law. Kettner, as a Palestinian citizen, was a British protected person.

The Court of Criminal Appeal held that Kettner was not a British subject and that he was an alien in the United Kingdom. The principal argument for Kettner was that Article 30 of the Treaty of Lausanne had provided that "Turkish subjects habitually resident in territory which in accordance with the provisions of the present treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred". The Court of Criminal Appeal's answer to this argument was:

(1) that this article did not apply to Palestine—an answer which it is not necessary to consider further here—and

(2) that in any case whatever the Treaty said, this man had not become a British subject.

There was, however, yet another answer to this argument, namely, that in any case Kettner had become a British national seeing that he had become a Palestinian citizen and all Palestinians enjoy the status of British protected persons. The whole argument in the case seems to have proceeded on the basis that there was only one sort of British national, namely, a British subject, ignoring altogether the other large class of British nationals, the millions of British protected persons.

Case No. 26. *Murray* v. *Parkes*, 58 T.L.R. 231 (Div. Ct.): Lord Caldecote L.C.J., Humphreys and Singleton J.J.

This was a test case selected from a number of appeals from decisions of courts of summary jurisdiction for the purpose of obtaining an authoritative decision on the liability of persons who are citizens of Eire and are in Great Britain to be called up for military service.

Murray was born in 1908 in Co. Roscommon, Ireland. He was at birth a British subject because he was born within the dominions and allegiance of His Majesty, the whole of Ireland being at that time undoubtedly a part of the dominions of His Majesty within the meaning of the British Nationality and Status of Aliens Acts and the common law. In 1922 Southern Ireland (including Co. Roscommon) became the Irish Free State by reason of the Irish Free State Constitution Act, 1922, and the Irish Free State Agreement Act, 1922 (both statutes of the Parliament of the United Kingdom), and was given the position of a Dominion within the British Commonwealth of Nations. Murray, having been born within the Irish Free State and being ordinarily resident and domiciled there before December 1922, when the Constitution of the Irish Free State (scheduled to the Irish Free State Constitution Act) was established, became an Irish citizen under that Constitution. But it was not contended that British subjects, who thus became citizens of the Irish Free State, thereby ceased to be British subjects, and it was stated in the judgments that there was nothing in the two Acts of 1922 referred to above indicating any intention that such persons should cease to be British subjects.[1] Murray came to England in 1934 and had resided in England since then. He retained the intention, however, of returning to Eire and had not lost his domicile of origin.

Under Section 1 of the National Service (Armed Forces) Act, 1939, His Majesty was empowered to direct by Proclamation that every male person between the ages of eighteen and forty-one, who at the date of the Proclamation was a British subject and in Great Britain, should be liable to be called up for service in the armed forces. Under Section 11, however, no person who is, under any Act in force in any part of His Majesty's dominions outside Great Britain, a national or citizen of that part (or is born or domiciled in any such part of His Majesty's dominions or in a British Protectorate, mandated territory or territory under His Majesty's protection or suzerainty) is liable for service, unless he has resided in the United Kingdom for two years or more, and even then he is not liable, if his residence is for the purpose of education or the circumstances show that he is residing there for a temporary purpose only. Section 3 provided that every person liable to be called up should submit himself to medical examination on being served with a written notice in proper form and be liable for penalties for failure to do so.

In May 1941 Murray was served with a notice, but failed to present himself. In October 1941 he applied for a permit to return to Eire, which was refused. He was prosecuted before the Justices of Leicester, convicted and fined, and it was ordered that he should present himself for examination and be detained by the police until taken before a medical board.

He appealed on the ground that he was not liable to be called up because (1) he was not a British subject in 1941 and had ceased to be so since 1937 or 1938; (2) (alternatively) if he was a British subject he was a citizen of Eire and was here for temporary purposes only and therefore should not be called up by reason of Section 11.

In support of ground (1), it was argued that (*a*) Eire had become separated from the British Commonwealth of Nations by reason of legislation passed by the Legislature of the Irish Free State in 1937, which enacted a new Constitution for that country henceforth called Eire, a constitution in which the King occupied no place; the Legislature of the Irish Free State had power, by reason of the Statute of Westminster, 1931, to pass statutes which were valid notwithstanding that they conflicted with statutes of the Parliament of the United Kingdom; (*b*) this separation of Eire had been recognized by the United Kingdom, because the Government of the United Kingdom had entered into agreements with Eire which were scheduled to the Eire (Confirmation of Agreements) Act, 1938; (*c*) Eire was no longer a part of the dominions of His Majesty within the meaning of the common law or of the United Kingdom Nationality Statutes, but was recognized by the United Kingdom as a completely separate and independent State; and (*d*) therefore those British subjects who were Irish citizens and domiciled in Eire ceased to be British subjects.

The second alternative ground of the appeal was rejected on the facts. With regard to the first contention, the court really based its decision, rejecting the appeal, on the ground that even if there had been a complete separation of Eire from the British Commonwealth of Nations, the appellant would still not have ceased to be a British subject because he was resident in England (i.e. on a rejection of point (*d*) in the argument), but it nevertheless felt it right to express an opinion on the other points in the argument, viz. (*a*), (*b*) and (*c*).

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[1] Indeed, the I.F.S. being a "Dominion" (see Case No. 27 below) persons born there after 1922 were born within His Majesty's dominions and allegiance in the same manner as persons born in Canada. "The I.F.S. Constitution of 1922 did no more than confer on the appellant a national character as an Irish citizen within the wider British nationality" (Lord Caldecote). Moreover, citizens of Eire (and this appellant among them) were not treated as aliens in the United Kingdom before or after 1937, and the appellant, if his argument was correct, was liable to various penalties under the Aliens Order for failing to register as an alien after 1937 or 1938.

With regard to (*a*), the Statute of Westminster, 1931, did not expressly or by implication provide for a separation or a right to secede from the British Commonwealth of Nations. The Government of Eire had never in terms declared that it had seceded and the court thought that the Government of Eire had not done so.[1]

With regard to (*b*) and (*c*), even if Eire had seceded, the secession would not be effective to cause all British subjects resident in Eire, to say nothing of British subjects domiciled in Eire but resident elsewhere, to lose their status as British subjects and become aliens on British territory unless and until the other members of the British Commonwealth of Nations had recognized Eire as a foreign State, and the appellant did not seem to dispute that such recognition by the United Kingdom was necessary. The court could see nothing in the Act of 1938 or in the Agreement scheduled thereto other than the confirmation of agreements between two sovereign members of the British Commonwealth of Nations. There was no mention of the Constitution of 1937 in the Act of 1938. The court were not therefore satisfied that Eire had been recognized as a foreign State by the United Kingdom.

With regard to (*d*), apart from treaty provisions to the contrary, a British subject becomes an alien by the cession of British territory in which he is resident at the time of cession. Remaining resident in the ceded territory is treated as an election to adhere to the new sovereign. This was shown by decisions given in 1824 and 1826 and relating to the separation of the United States of America, but the appellant was resident in the United Kingdom, and the fact that he retained his domicile of origin in Eire did not affect the matter.

Case No. 27. The decision of the Court of Appeal in *Hume Pipe, etc., Co. Ltd.* v. *Moracrete Ltd.* (58 T.L.R. 75) is really a decision that Eire is a British Dominion and that a company incorporated in Eire is a British company and, therefore, analagous to a British subject and not to an alien. The point arose out of an application for service out of the jurisdiction in connexion with the claim by the plaintiff company, which was in England for all purposes, against the defendant company, which was an Irish company only carrying on business in Dublin. The case was one where obviously service out of the jurisdiction could be allowed because the action was one for breach of contract, and the contract was governed by English law. However, there was a dispute as to the form of the process which should be served on the company in Dublin. It should be explained here that when English process is served out of England it takes the form either of (*a*) service of the actual writ; or (*b*) service of notice of the writ. A writ is served when the service takes place in other British territory or when the person to be served is a British subject. Notice of a writ is served when the person to be served is an alien and is in foreign territory. The idea is that, when the person to be served is not subject either to the personal or territorial jurisdiction of the Crown, it is a matter of comity that a notice of the writ rather than the writ itself should be served on him. In this case it was held, for the reason given above, that it was proper for a writ rather than a notice of a writ to be served.

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[1] *N.B.*—Up till the war in 1939, His Majesty was still, at the request of the Irish Government, performing acts in the realm of foreign affairs for Eire, viz., signing Full Powers and Instruments of Ratification of Treaties, under a provision of the Constitution of 1937 providing for this. Imperial preference in customs duties was being extended to imports from Eire in all parts of the Commonwealth and vice versa, which would have been contrary both to the provisions of domestic laws and a violation of the rights of foreign Powers under treaties if Eire was not still within the Commonwealth.

DECISIONS OF THE ENGLISH COURTS RELATING TO TRADING WITH THE ENEMY IN THE YEARS 1939–43

Introduction

Before considering in detail the decisions on this subject, it may be helpful to point out that the law of Trading with the Enemy in England is contained partly in the common law and partly in statute law. Both the common law and statute law prohibit trading or other intercourse in time of war with the inhabitants of the hostile country. The common law doctrine is stated in *The Hoop*, 1799, 1 Ch. ROB. 169, by Lord Stowell:

> "One of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. . . . This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with all subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of what will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit money or goods or other resources available to individuals in the enemy State."

The common law embodies within it three legal doctrines on which the statute law is silent:

(1) An alien enemy has no *persona standi in judicio* except by Royal Licence, i.e. he is debarred from commencing or pursuing legal proceedings in the King's courts in the capacity of plaintiff unless he holds a Royal Licence.

(2) Certain classes of contract, one of the parties to which becomes an alien enemy are abrogated entirely and the performance of them is not merely suspended by the outbreak of war. Examples of contracts which are thus dissolved are a partnership agreement or a contract of agency which becomes void as soon as one of the persons with whom such agreement or contract has been made becomes an alien enemy.

(3) An alien enemy who is within the realm by Royal Licence (which for this purpose includes a permit under the Aliens' Restriction Act) is excepted from the disabilities of status attaching to alien enemies in general.

The statute law is now contained in the Trading with the Enemy Act, 1939, as amended by the Defence (Trading with the Enemy) Regulations and in the various Orders made under the Act.[1] The principal Order is the Trading with the Enemy (Custodian) Order, 1939. The statute law has two objects. First, it creates and defines a criminal offence by statute,[2] the offence of Trading with the Enemy; Section 1, subsection (2) of the Act defines the offence as having "any commercial, financial or other intercourse or dealings with, or for the benefit of an enemy" subject to the two provisos contained at the end of that subsection. The second object of the statute law is to "prevent the payment of monies to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace".[1] It achieves this by requiring payment to Custodians of Enemy Property of money which would otherwise be payable to an enemy.[2] Property of enemies other than money is required to be reported to the Custodian by anyone who holds or manages it. The Board of Trade has power to vest such property in the Custodian and certain further powers, including special powers to control with or without winding-up enemy-owned businesses. There is also a power reserved to apply these provisions to the property of enemy subjects, i.e. nationals of an enemy State who are resident outside the territory of such State.

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[1] Special provisions concerning Patents, Designs, Copyrights and Trade Marks in which there is an enemy interest are contained in the Patents, Designs, Copyrights and Trade Marks (Emergency) Act, 1939.

[2] There is some uncertainty whether at common law Trading with the Enemy is a criminal offence. See, however, *Henkle* v. *London Exchange Assurance Co.*, 1 Ves. 317, in which it was admitted in argument by the Solicitor General (subsequently Lord Mansfield) that trading with the enemy constituted a misdemeanour.

The definition by statute of the term "enemy" includes the following:

(*a*) Any State, or Sovereign of a State, at war with His Majesty.

(*b*) Any individual resident in enemy territory.

(*c*) Any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who is an enemy within the Act.

(*d*) Any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty.

(*e*) As respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business.

(*f*) "Specified" persons, i.e persons whose names are placed upon the Statutory List by order of the Board of Trade.[3]

"Enemy territory" under the statute includes any area under the Sovereignty or in the occupation of a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with him, and also any area specified by the Board of Trade in an Order applying the provisions of the statute to such area.[4] It will be noted that such last-mentioned area need not necessarily be in the actual occupation of the enemy. It is clear that the main test of enemy character is residence and not allegiance. The statute has extended the class of persons who may be enemies beyond the limits of the common law by setting up a Statutory List of enemies and by giving power to the Board of Trade to apply the provisions of the Act to any area, whether it is occupied by the enemy or not.

As a result of the decisions of the courts reviewed below, it now seems clear that the statute has neither revoked nor superseded the common law doctrines especially those defining enemy status; both systems of law are in force. The statute has in certain respects extended and amplified the common law.[5] Some of the cases reviewed illustrate how the courts have interpreted both bodies of law, bringing them on occasions into harmony with each other, while on a few points some uncertainty still seems to exist.

Case No. 1. The most important decision during this period is that of the House of Lords concerning the enemy status of the owners of the steamship *Waalhaven*. The effect of the House of Lords decision which reversed those of the courts below is that a company domiciled in the territory of a country which is occupied by the enemy is itself an enemy at common law as well as under the statute, and in consequence is unable to maintain an action in the English courts as plaintiff unless it first obtains a Royal Licence from the Crown.

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[1] Trading with the Enemy Act, 1939, Section 7.

[2] Custodian Order, Paragraph 1.

[3] Trading with the Enemy Act, Section 2.

[4] Trading with the Enemy Act, Section 15.

[5] Shortly after the 1914–18 War the case of *In re Ferdinand, ex-Tsar of Bulgaria*, [1921] 1 Ch. 107, decided that the common law right of the Crown to seize the private property of a subject of an enemy State had not been abandoned by desuetude, but that the powers conferred by the Trading with the Enemy Act, 1914–16, were so inconsistent with the exercise of the common law right that that right must be treated as being thereby, at least temporarily, superseded.

The full title of the *Waalhaven* case is:

Sovfracht (*V/O* v. *Van Udens Scheepvaart en Agentuur Maatschappij.* (*N.V. Gebr.*), [1943] A.C. 203, 168 L.T. 323, 59 T.L.R. 101, [1943], 1 All. E.R. 76.

The respondents, a ship-owning company incorporated under the law of the Netherlands, having their principal place of business at Rotterdam, had chartered one of their ships, the *Waalhaven*, before the outbreak of war to the appellants, who were a Russian company. Disputes arose and the respondents sought arbitration in London under a clause of the charter party. Arbitrators were appointed but after the occupation of Holland by German forces in May 1940, the appellants refused to proceed with the arbitration on two grounds: (*a*) that the respondents were alien enemies and (*b*) that the retainer to their solicitors had been terminated. A summons taken out by the respondents for appointment of an umpire reached the House of Lords. The solicitors purporting to act for the respondents had obtained an authority from the Trading with the Enemy Branch (Treasury and Board of Trade) under the Trading with the Enemy Act, 1939, Section 1, Subsection 2 (i), which gave them authority to continue to represent and act on their clients' behalf.

Held by the Court of Appeal:

(1) The respondents were not in the position of alien enemies at common law and thus still enjoyed the right of resort to the King's courts.

(2) The respondents were an enemy corporation within the meaning of the Trading with the Enemy Act, 1939, but their solicitors were not acting illegally inasmuch as they had obtained the above-mentioned authority from the Trading with the Enemy Branch.

The appellants appealed to the House of Lords and argued that the respondents were alien enemies at common law and therefore debarred from taking proceedings before the English courts; that the test of who was an enemy was commercial domicile, not nationality or allegiance; that there could be no distinction for present purposes between German territory proper and territory effectively occupied by the Germans.

The respondents contended:

(1) They were not enemies because they were not enemy nationals resident in their own country or resident elsewhere and engaged in acts hostile to England; nor were they voluntarily residing or carrying on business in the enemy's country; nor were they British subjects voluntarily resident in the enemy's country and giving him allegiance, and said that these were the only classes of persons recognized by the common law as enemies.

(2) The test of enemy character for the purposes of determining the right to sue is allegiance, permanent or temporary, to the King's enemies.

(3) There was a distinction between the extent of enemy character sufficient to justify a seizure of his property, and that required to deprive him of a right to sue.

(4) Territory which is merely occupied by an enemy is not enemy territory at common law, for the inhabitants of an occupied country owe no duty to an invader.

All the respondents' arguments were rejected. The House of Lords, unanimously reversing the Judgment in the Court below, held that the respondent company was an alien enemy at common law and had no right to sue in the King's courts unless it first obtained a Royal Licence.

Lord Simon, L.C., said: "There can be no doubt that the respondent company must be treated as resident in Rotterdam. Their commercial domicile is there and there is no indication that it has changed. The case must be dealt with as though they were an individual subject of Holland living there . . . the question is therefore simply whether residence in territory which has been invaded and is forcibly occupied by the enemy disqualifies (apart from Royal Licence) from bringing or pursuing a suit in the King's courts . . . the operation of the rule refusing *persona standi in judicio* is always subject to permission being given by Royal Licence. In the present case no application for a Royal Licence has been made." Lord Wright said: "I feel, I confess, a natural repugnance to describing as enemies of this country those loyal and patriotic subjects of Holland who have the misfortune to be forced to reside there after the German occupation. But this distasteful appellation has already been attached to all residents in Holland, as the Court of Appeal have rightly and indeed inevitably held, by Parliament under the appropriate Act and Regulations, and matters are not made worse if under the common law the Respondent is to be deemed an enemy corporation. It is true that the statutory definitions dealing with Trading with the Enemy and the custody of enemy property are limited to purposes of the Act and Regulations and do not impinge on the common law in regard to the separate question of an enemy's competence to sue. On the whole, however, I think that these definitions, at least in their latest form, do substantially agree with the definitions of enemy and enemy-occupied territory reached by the common law . . . this enemy character depends upon objective facts, not on feeling or sentiment, or on birth or nationality."

On the subject of "enemy-occupied" territory Lord Wright also stated:

> "It is, however, also necessary to define what is meant by enemy-occupied country in this context, and determine whether the facts justify the description being applied in any particular case. It might be better if the epithet applied were enemy-subjugated territory. This would show that a mere temporary occupation, for instance, by a military force, in the conduct of military operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact, with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised."

This decision confirms that residence in enemy territory is the test at common law of enemy character, and makes it clear that a company whose principal place of business is in enemy territory is an enemy for all the purposes of English law. In relation to such companies it is not possible for them to be enemies under the statute and not enemies under the common law. While this decision has brought into harmony the definition of the enemy character of residents in occupied territory in the common law with that under the statute, the judgments contain certain *obiter* which may give rise to further difficulties in the future. It seemed to be assumed by the House of Lords that a Royal Licence if applied for would be freely granted in a proper case. In fact there is no published information to show that any Royal Licence has as yet been granted during the present war. A more serious difficulty arises in connection with the *obiter dicta* of Lord Wright concerning the solicitors' retainer. While admitting that the precise question did not arise for decision in the present Appeal, he gave it as his opinion that a retainer, like any other contract of agency, is abrogated when the client who is the principal becomes an enemy. Lord Porter gave an opinion to the same effect.[1]

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[1] It is not easy to reconcile these dicta with the decision of the Court of Appeal in *Eichengruen* v. *Mond*, 56 *T.L.R.* 845, that the outbreak of war did not have the result of removing from the record the name of the Solicitors acting for the Plaintiff, who thereupon became an enemy, and that an application by the Defendant to strike out the Statement of Claim had been duly served on the Solicitors in the record.

Both expressed some doubt as to the correctness of the majority decision of the Court of Appeal in *Tingley* v. *Muller* ([1917] 2 Ch. 144). If this argument is sound it would seem to apply to the position of a solicitor acting for an alien enemy who is a defendant. It has always been a doctrine of the common law that an alien enemy can appear in the King's courts as a defendant.[1] It is doubtful how far these *obiter* are intended to be of general application. The position of a solicitor acting for a defendant who is an alien enemy might become very difficult. If the principle were applied generally, it would become necessary for him to obtain a fresh retainer from his enemy client after that client had become an enemy.[2] Further, the Sovfracht case makes it clear that an authority granted under the Trading with the Enemy Act by the Board of Trade is not the same thing as a Royal Licence at common law, but the House of Lords itself does not seem to have been quite consistent. In the case of *Fibrosa S.A.* v. *Fairbairn Lawson Combe Barbour Ltd.* ([1943] A.C. 32, 167 L.T. 101), a company, whose principal place of business was in Poland, sued an English manufacturer for the return of a deposit paid in respect of a contract for delivery of machinery, which contract was abrogated by the enemy occupation of Poland. In that case the point was not taken that the plaintiff required a Royal Licence before resorting to the King's courts. In the Sovfracht case counsel for the respondent pointed this out; the Lord Chancellor said: "In that case the House had expected the plaintiffs to obtain a licence of the Crown. Instead they obtained a licence of the Board of Trade. I doubt whether that was regular. The House treated it as sufficient, but it is not to be taken that the House has laid it down that a company domiciled in territory occupied by the enemy can litigate to its heart's content provided it obtains the consent of the Board of Trade." The learned Law Lord does not seem to have appreciated the point that a Board of Trade licence under the Act is granted to the solicitor or other agent while a Royal Licence would be granted to the enemy himself. It is also to be noted that in *H. F. Drewry S.A.R.L.* v. *Onassis* (71 Lloyds Reports 179), Lords Justices MacKinnon and du Parcq granted an application for setting down for hearing in the Commercial Court a special case stated by an arbitrator in a dispute in which the claimant was a French "Société à Responsibilité Limitée" of Paris, wholly owned by an Englishman resident in England. The applicants had obtained a written authority under the Trading with the Enemy Act to pursue these proceedings. One of the points to be decided in the special case was whether the claimant was an alien enemy at common law. The court refused to decide this on the preliminary point as to whether the case might be set down, though it would appear that the plaintiff had no *locus standi in judicio*.[3]

The application of the doctrine to the Prize Court is also not yet quite clear. In *The Pomona* (168 L.T. 222), the German owners of a vessel registered at Hamburg entered an appearance to an action by the Crown for condemnation and claimed that the vessel was immune from capture and could only be detained because on the outbreak of war she was under civil arrest and not allowed to sail. Lord Merriman said that before dealing with the merits of the case he must say a word with regard to the status of the owners in the case before the court. Although they were not able to rely on any international agreement, the Attorney-General had raised no objection to their being heard and submitted the matter to the discretion of the court. He, the President, therefore came to the conclusion that the circumstances on which the claimants relied as giving the vessel immunity from capture, though falling short of any treaty regulations, justified him in hearing their claim. This question has, however, been more closely argued in the Prize Court in the case of *The Glenroy W.N.*, 18th September 1943 (170 L.T.R. 273). The facts were that a British ship in November 1939 on voyage from Far Eastern ports to Hamburg, discharged at Liverpool a cargo of beans consigned by the Mitsui Company in Japan to its Hamburg branch. The cargo was seized in prize. The London branch of Mitsui entered an Appearance and claimed the release of the cargo. On the entry of Japan into the war, the Board of Trade appointed a controller to wind up the London business. The controller pursued the proceedings in the Prize Court, resisting the condemnation of the cargo, and so framed the case as to bring before the court two alternative claims, one on behalf of the Mitsui Company and the other on behalf of the business of the London branch. The President, in an interlocutory judgment, held that subject to a narrowly defined class of exceptions, an alien enemy was not in a position to pursue a judgment in the Prize Court without a Royal Licence, but that the controller as representing the business of the London branch of the Mitsui Company, a notional entity recognized in law as distinct from the company resident in Japan, had full capacity to continue the proceedings, the success of which would depend upon his ability to prove a title of the London business separate from the title of the company in Japan. It is possible that an appeal against this decision is pending.

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[1] *Porter* v. *Freudenberg*, [1915] 1 K.B. 857.

[2] In the unreported case of the s.s. *Virgilio* in 1943, an Admiralty Registrar, believing himself to be acting in accordance with the House of Lords decision in the Sovfracht case, recently refused to hear London solicitors in an inquiry into damages in which they were representing the defendants who were Italian shipowners. The Registrar based his decision upon a contention put forward by the plaintiffs that the retainer of the defendants' solicitors had come to an end. On appeal to the Judge in Chambers, Mr. Justice Bucknill reversed the Registrar's ruling, stating that it offended all sense of justice to say that the solicitors for an enemy alien sued here have no right to appear here and continue to act. In referring to the Sovfracht case, he stated that the Law Lords were only concerned with the right of an enemy to sue, and that they had confirmed and supported the decision in *Porter* v. *Freudenberg* of the last war, in which the Court of Appeal had laid down that an enemy alien may be sued.

[3] Litigation between the same parties has also taken place in the U.S.A. See *New York Law Journal*, 1942, p. 1496. Judgment was given in favour of the defendant.

Case No. 2. The litigation between Stockholms Enskildabank and Schering Ltd. has thrown important light on the meaning of the words "for the benefit of an enemy".

There have been two separate cases, each reaching the Court of Appeal. The first case is *Stockholms Enskildabank* v. *Schering Co. Ltd.* ([1941] 1 K.B. 424). Under a written agreement made in 1939 the plaintiff bank had sold to a German company, Schering Kahlbaum A/S, a sum of Reichsmarks for which the German company agreed to make repayment in sterling at the end of eight years. By a further agreement an English company, Schering Ltd., the defendants, became sureties for the payment of the debt by the German company, and as principals agreed to pay the debt at a discount by instalments on having assigned to them a proportionate part of the German company's debt against payment of each instalment. The plaintiffs sued the English company to recover an instalment which became due after the outbreak of war with Germany.

The defendant company contended:

(1) The German company was an enemy under the Trading with the Enemy Act, 1939, and that if the English company met the claim they would be guilty of an offence of Trading with the Enemy under Section 1 of the Act on the ground that

(2) such payment would be for the benefit of the German company, or

(3) it would operate to discharge *pro tanto* the obligation of the German company as principal debtor to the plaintiffs.

In the court of first instance it was held that payment would be a financial dealing for the benefit of an enemy within the meaning of Section1, Sub-section (2) (a) of the Act. The plaintiffs appealed. Their main contention was that payment would not discharge an obligation of the enemy company but would merely transfer it into an obligation to the English company instead of to the Swedish bank. The Court of Appeal dismissed the Appeal, holding that the words "for the benefit of an enemy" are words of the widest possible character, wide enough to sweep in any transaction of which it can truly be said that it is for the benefit of an enemy (which was a question of fact in each case). The transaction involved in this case was held to be undoubtedly of benefit to the enemy.[1]

The second case is *Schering Ltd.* v. *Stockholms Enskildabank*, 168 L.T. 225 and 169 L.T. 332. In respect of the same transaction the English company sued the Swedish bank for a declaration that the 1936 contract was no longer enforceable and claimed the release of the sum of £25,000 held as security for the performance of its contractual obligations. In the court of first instance Simmonds J. held that the test of whether the 1936 contract had become void on the outbreak of war was (1) whether it involved intercourse with the enemy, or (2) conferred an immediate or future benefit upon him. He found in favour of the plaintiffs, declared that the contract was abrogated at common law and not merely suspended, and that the plaintiffs were entitled to the return of their deposit.

This decision was reversed on appeal. The Court of Appeal agreed that performance of the 1936 contract during the war was illegal under the Trading with the Enemy Act and possibly also at common law, but said that it was impossible, and on public grounds undesirable, to lay down that mere possibilities of benefit to an enemy, so vague and uncertain as in the present case, must in law abrogate a contract such as the present contract with a neutral, and that the contract was not abrogated on the outbreak of war on grounds of public policy. The Master of the Rolls said it would appear that in cases where the outbreak of war impels the common law to interfere with and control the performance of such contracts on the grounds of public policy, the measure of interference ought not to exceed what is required in the public interest in regard to the successful prosecution of the war. In the case of contracts between a British subject and an enemy, a state of war abrogates and puts an end to all executory contracts which for their further performance require intercourse between the British subject and the enemy.[2] The Master of the Rolls went on to say that in the case of a contract with a neutral, this absolute rule against the maintenance of contracts clearly cannot apply. Trading and intercourse with a neutral are not at common law unlawful in time of war. Restrictions may, of course, be placed on such activities, but that is not to say that an executory contract with a neutral is made unlawful at common law. He disagreed with the judge below that the existing authorities decided that a contract between a British subject and a neutral, the performance of which is prohibited during the war as being for the benefit of an enemy, is necessarily incapable as a matter of law of remaining in existence under suspension, whether such suspension be due to operation of law or to a contractual term. Leave to appeal to the House of Lords has been given and it is therefore possible that further light will shortly be thrown on the vexed question as to whether an executory contract with a neutral, the performance of which during the time of war will be of benefit to an enemy, is itself necessarily abrogated or may merely be held in a state of suspension and cannot be performed during the war. The suggestion that such a contract is not abrogated is a new departure in English law. The application of the doctrine is apparently dependent on the facts of each particular case. While it is clear law that a contract with an enemy which is not fully executed and requires for its performance intercourse with the enemy is *ipso facto* dissolved by the outbreak of war, this new doctrine of preserving the existence of some executory contracts with neutrals, seems difficult to reconcile with the rule that all executory contracts with the enemy himself, irrespective of the extent of the benefit which the contract would confer on him, are *ipso facto* dissolved. It is, however, satisfactory to know that there is no discrepancy between the common law and the position under the statute as to what is meant by the words "for the benefit of an enemy". It is also clear that actual execution during time of war of any such contracts is illegal, subject only to the doubts which have been raised by the decision in the case of *R. & A. Konstamm* v. *Ludwig Krumm* (*London*) *Ltd.* (*Supra*).[1]

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[1] The Master of the Rolls referred to the decision in *R. & A. Konstamm* v. *Ludwig Krumm (London) Ltd.*, [1940] 2 K.B. 359, in which MacNaghten J. had held that where a surety discharges the debt of his principal, it was not correct to say that the obligation of the principal debtor had been discharged within the meaning of the Trading with the Enemy Act, but he declined to follow it and distinguished it on the facts.

[2] This follows the decision in *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A.C. 260.

Case No. 3. *Vandyke* v. *Adams*, [1942] Ch. 155, 166 L.T. 117, 58 T.L.R. 129. The Rules of the Supreme Court (Order IX, Rule 14B) provide that subject to the provisions of that trule the court or a judge may dispense with the service of a writ of summons, or a notice of a writ of summons, on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended. The plaintiff claimed to be entitled to the release of a sum of money deposited in the joint names of himself and the defendant. The defendant was an officer in the Army who had been captured in 1940 and was detained as prisoner of war in Germany or German-occupied territory. In these circumstances personal service of the writ upon him was impossible. In January 1942 the plaintiff asked for an Order under this Rule of Court, dispensing with service of the writ upon the defendant. The question which the court had to decide was whether the defendant was an enemy within the meaning of the Trading with the Enemy Act, 1939, i.e. whether he was an individual resident in enemy territory. Mr. Justice Farwell said that on considering the whole purpose of the Trading with the Enemy Act, 1939, a soldier in His Majesty's Army who had the misfortune to have been taken prisoner during the war and was detained as a prisoner in Germany was not an enemy in any sense of the word at all. He accordingly refused to make an Order to dispense with service.

This is the only decision so far available upon the meaning of the word "resident" as it is used in Section 2 of the Trading with the Enemy Act. It seems to be based on the doctrine that detention by the enemy as a prisoner negatives the notion that he can be said to be resident in Germany as his confinement there is entirely against his own will.[2]

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[1] It is interesting to note that in circumstances of a somewhat special nature the courts have allowed the bringing of an action during the war by a non-enemy though such action will obtain a benefit for an enemy. In *Weiner* v. *Central Fund for German Jewry*, [1941] 2 All E.R. 29, a plaintiff resident in England had deposited money with the defendants for the purpose of helping two Jewish refugees to go from Vienna to England. The outbreak of war rendered the carrying out of this purpose impossible. The plaintiff began this action as one for the recovery of the deposit, but in the course of it admitted that he had no right to it but was willing that it should be handed over to the Custodian of Enemy Property. The defendants contended that these proceedings were brought on behalf of an alien enemy and could not be entertained in England. It was held that this was not a case which must be rejected in limine. The plaintiff's rights could be determined by the court but any sum recovered must be paid to the Custodian of Enemy Property. *In re San Pietro deceased*, [1941] P.16; grants of Letters of Administration ad colligenda bona in the case of deceased's estates in which there were enemy interests were made by the Probate Court in favour of the Public Trustee. This follows in *In re Schiff*, [1915] P. 86. See also *In re Hans Fischer*, deceased, 56 *T.L.R.* 560.

[2] Attention is drawn to the following decisions concerning the service of legal proceedings upon enemies:

In *Meyer* v. *Louis Dreyfus et Cie*, 163 L.T. 335, the Court of Appeal held that a writ issued against a French partnership firm after the French-German armistice was validly served on the Manager of the London office of the French firm; the Manager held a licence from the Board of Trade under the Trading with the Enemy Act to continue to manage the business.

Case No. 4. *In re Anglo-International Bank Ltd.* ([1943] 1 Ch. 233), 99 shareholders in a company who had registered addresses in various enemy or enemy-occupied countries were not served, either personally or by post, as required by the company's Articles of Association, with notices of an Extraordinary General Meeting at which was passed a special resolution for the reduction of the capital of the company. The judge below having held that the special resolution had not been duly passed because no notice of the meeting had been given to these shareholders with addresses in enemy territory, the company appealed and contended:

(1) These shareholders were enemies at common law and their contractual rights under the Articles of Association were suspended.

—This theory was not accepted.

(2) The company could have no dealings with these shareholders owing to the provisions of Section 1 of the Trading with the Enemy Act.

—This theory was held to be correct.

(3) The company could not be required to apply to the Board of Trade for licence to communicate with these enemies.

—This theory was also held to be correct.

The court allowed the appeal on the two contentions based on the Trading with the Enemy Act. It held that as a result of this legislation the company was forbidden by law to have or attempt to have any communication with any of the ninety-nine shareholders. It would have been an offence merely to put in the post notices addressed to them at their registered addresses. This was equivalent to suspending their right to receive notices, and during the period of suspension they could be in no better position than they would have been if under the Articles no right to receive notices had been given to them. The company was not under any obligation to put itself to the trouble of applying to the Board of Trade for a licence under the Trading with the Enemy Act to communicate with these enemies. The contention that these shareholders were enemies at common law was rejected on the ground of lack of evidence, the Court of Appeal holding that on the evidence before them they did not think it would be safe to hold that all the shareholders whose registered addresses were in enemy-occupied territory were to be regarded as alien enemies at common law, but that the position under the Trading with the Enemy Act was different. The court followed certain observations of Lords Wright and Porter in the Sovfracht case which suggested that at common law the character of enemy territory only became attached to occupied territory which had been enemy subjugated, i.e. that it must be held under the dominion and control of the enemy for periods sufficient to give the occupation a settled and relatively permanent character and show the intention to keep it. It seems that there is some difference between common law and statute law in the definition of enemy-occupied territory, but that such difference as may exist is of academic interest only owing to the statutory powers of the Board of Trade under Section 15 (1) (a)

[*Note continued from previous page.*]

In re an intended action between *V. L. Churchill and Co., Ltd* and *Lonburg*, [1941] 3 ALL E.R. 137; the appellant company desired to commence proceedings against a person resident in Copenhagen, and asked for an Order for substituted service of notice of the writ. He proposed to insert an advertisement giving notice of the action in a Swedish newspaper which was stated to have a circulation in Copenhagen. Held by the Court of Appeal that as there was nothing to show that the advertisement would be likely to come to the knowledge of the proposed defendant, an Order for such substituted service could not be made.

As to the discretion of the Divorce Court in dispensing with service of a Divorce Petition upon a respondent in enemy territory, see *Read* v. *Read*, 166 L.T. 153 and (No. 2) 167 L.T. 324, and *Luccioni* v. *Luccioni*, 168 L.T. 263, in both of which cases leave to dispense with service was refused.

of the Act to apply by order the provisions of the Act to any area (irrespective of occupation or subjugation).

Case No. 5. *Lubrafol motor vessel* (*owners*) v. *Pamia* (*owners*) ([1943] 1 All E.R. 269, 168 L.T. 282). The plaintiff company had been incorporated in Belgium and had taken proceedings in a collision action for damages to their ship. The defendant moved the court to stay all further proceedings on the ground that the plaintiffs were alien enemies at common law. The plaintiffs relied on an Order in Council of the Belgian Government made in Belgium on the 2nd February 1940, which enabled Belgian commercial companies without losing their Belgian nationality to transfer their head offices to a neutral country, and contended that they had taken the appropriate steps at Pittsburg in the United States of America to transfer the domicile of the company from Antwerp to Pittsburg. The court held that the Belgian company had transferred its commercial domicile to the United States of America and were not enemies. The motion was accordingly dismissed.

It will be noted that in this case an English court gave recognition to a regulation made by a foreign Government while in its own territory in connection with the determination of the non-enemy status of the plaintiffs.

Case No. 6. *Lorentzen* v. *Lydden & Co., Ltd.* ([1942] 2 K.B. 202; [1943[1 All E.R. 269). This case also concerns a decree made by a foreign friendly Government. On 18th May 1940 the Norwegian Government had made at Trondhjem in Norway a decree by which all ships registered in Norway and situate outside the part of Norway then occupied by the enemy and owned by a business in the occupied part were requisitioned by the Norwegian Government. The Norwegian Minister of Shipping was appointed "curator", and was stated to be entitled to collect claims belonging to the owners and to enforce such claims by action. The decree provided for compensation to be given to the owners for what had been taken under it. Acting under these powers the "curator" brought an action on behalf of the owners of the s.s.*Tempo*, a company carrying on business in Oslo, against the defendants in London, to recover damages for breach by them of a contract to charter the s.s. *Tempo*. The defendants contended:

(1) the "curator" had no right or title to claims belonging to the owners of the s.s. *Tempo*;

(2) the Norwegian Government could not by any legislative or executive act transfer the claims to any property situate in England.

The court had before it a letter from the Foreign Office: "I am directed by Mr. Secretary Eden to state that on the 18th May 1940 His Majesty's Government in the United Kingdom recognized the Norwegian Government as the *de jure* Government of the entire Kingdom of Norway and did not at that date recognize, and has never recognized, any other Government as either the *de jure* or *de facto* Government of Norway or any part thereof".

The court took into consideration:

(1) This was not a confiscatory decree.

(2) England and Norway were engaged together in a desperate war for their existence, and that public policy demanded effect should be given to the decree.

A decision on this issue was accordingly given in favour of the plaintiff.

It will be noted that the defendant did not take the point that this action was being brought for the benefit of an enemy or that in English law (the Custodian Order made under Section 7 of the Trading with the Enemy Act, 1939) any money payable to the owners of the ship was required to be paid to the English Custodian of Enemy Property whose title appears to conflict with that of the Norwegian "Curator".[1]

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[1] As to recognition by an English court of a decree of a foreign Government made by that Government while in England, see the *King* v. *The Home Secretary, ex parte Amand*, [1941] 2 K.B. 239 and (No. 2) [1942] 1 K.B. 145, 167 L.T. 177.

Case No. 7. *In re Banca Commerciale Italiana* ([1942] 1 Ch. 406 and (No. 2) [1943] 1 All E.R. 480). On the 25th September 1940, after the outbreak of war with Italy, the Board of Trade made an Order under the Trading with the Enemy Act, 1939, appointing a Controller to wind up the English branch of an Italian bank. By Section 3A, Sub-Section (3) of that Act, the distribution of the assets of the business controlled is subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and the assets available are to be applied in discharging unsecured debts due to creditors of the business who are not enemies in priority to unsecured debts due to any other creditors. Summonses were issued for determination of various questions. In the first case the court held:

(1) Holders of foreign currency accounts in the Bank were not "creditors" entitled to participate in the distribution of assets.

(2) The date for ascertaining which of the creditors are "enemies" within the Act is the date of the Winding-up Order.

The decision on point (2) follows that of *In re Deutsche Bank* ([1921] 2 Ch.30), which interpreted a regulation employing similar words made in the war of 1914–18. The effect of this decision is somewhat surprising; a creditor of an Italian bank resident in Japan is to be treated as though he were not an enemy because on the 25th September 1940 Japan was not at war with the United Kingdom. In consequence such a creditor is entitled to participate in the distribution of available assets, though, of course, payment cannot be made to the Japanese creditor himself, but must be made to the Custodian of Enemy Property. The assets available for distribution among the non-enemy creditors of the bank are diminished by the amount which has to be set aside for the Japanese creditor. It is to be doubted whether this result accords with the apparent intention of the framers of this regulation.

In the second case it was held:

(1) The Winding-up Order under the regulation created a new entity for the purpose of winding up, namely, the business ordered to be wound up.

(2) The winding-up is conducted by the Board of Trade, who alone under the regulation are authorized to direct the way in which the business is to be wound up and its creditors ascertained and paid.

(3) The Controller is an officer of the Board of Trade. It is for them, not the court, to give him orders as to how he is to discharge his duties; it is to them that he is answerable for his conduct.

(4) The jurisdiction of the court under the regulation and the Winding-up Order is merely advisory, exercisable only at the instance of the Board of Trade or the Controller acting with their consent. No person claiming to be a creditor is given any right under the regulation to approach the Court.

The effect of this last decision seems to be that all questions relating to the winding-up of an enemy business under the regulation are to be dealt with entirely by an executive Department of the Government, and the parties aggrieved thereby have no right to apply to the court for protection.[1]

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[1] The rights of a customer of a branch in enemy territory of an English bank were considered in *Isaacs* v. *Barclays Bank Ltd. and another*, 196 L.T. Jo. 199. A non-enemy customer of the Monte Carlo branch of Barclays Bank, France, had deposited securities with that branch which were subsequently transferred to the head office of the same bank in London. On the customer demanding delivery up of the securities, the Head Office contended that it was not in a position to comply with his demand without the consent of the Monte Carlo branch, which could not be obtained. The court rejected this contention and gave judgment for the plaintiff.

Reference may also be made to *Ginsberg* v. *Canadian Pacific Steamship Co., Ltd.*, 1940, 66 Lloyds Reports 206, in which plaintiff obtained judgment for repayment in sterling of a deposit made in Germany in respect of an unused passenger steamship ticket bought under an English contract.

NOTES

(*a*) *Re Gourju's Will Trusts. Starling* v. *Custodian of Enemy Property* ([1943] 1 Ch. 24, 194 L.T. Jo. 213), concerned the destination of the income of a trust fund settled on a protected life interest where the beneficiary acquired enemy character. The court held on construction of the terms of the Trust that the acquisition of enemy character by the beneficiary was the "happening of an event" which deprived her of the enjoyment of the right to receive the income and therefore created a forfeiture. The court also held that any income required under the terms of the Custodian Order to be paid to the Custodian of Enemy Property would not be held by him as agent for the beneficiary, and that she had no beneficial interest in monies paid to the Custodian. On this point the court followed *re Munster* ([1920] 1 Ch. 268).

In the cases of *Re Hall* (169 L.T. 387) and *Re Viscount Furness deceased, Wilson* v. *Viscount Furness*, unreported, *The Times*, 22nd December 1942, the court construed two other trusts in which the wording was materially different from that employed in *Re Gourju* and held there was no forfeiture.

(*b*) In *In re Farbenindustrie Aktiengesellschaft's Agreement* ([1941] 1 Ch. 147), the court decided that neither the Trading with the Enemy Act, 1939, Section 4, nor the Patents, Designs, Copyrights and Trade Marks (Emergency) Act, 1939, Section 2, Sub-Section (1), prevented the court from making in its unfettered discretion, if on other grounds it was satisfied to do so, a Vesting Order under the Trustee Act, 1925, in respect of patents registered in the name of an enemy, I.G. Farbenindustrie A.G., who, according to the claims of the applicant, Bayer Products Ltd., was a bare trustee for such applicant.

In re Farbenindustrie Aktiengesellschaft's Agreement (No. 2) (169 L.T. 321, 196 L.T. Jo. 170). The Court of Appeal decided that Boots Pure Drug Company, who held licences under these patents granted to them during the war by the Comptroller under the Patents, Designs, Copyrights and Trade Marks (Emergency) Act, 1939, had no right to be heard in the above-mentioned proceedings in opposition to the application made by Bayer Products Ltd. on the grounds that they had no legal interest in the subject matter of the dispute, i.e. the legal title to the patents, and that their interest was of a commercial nature only.

(*c*) *The Glenearn* ([1941] P. 51). The Prize Court decided that there was no Trading with the Enemy illegality in an arrangement made in contemplation of war and shortly before its outbreak with a person who on such outbreak became enemy, to acquire the property in a certain cargo in part satisfaction of other outstanding claims.

(*d*) *The Prins Knud* (]1941] P. 39). The Prize Court had before it a claim for salvage services against a ship seized in prize as the property of an enemy resident in Denmark but not condemned, and refused an application by the salvors for condemnation of the ship and for immediate payment of their salvage claim which, the court ruled, should be postponed until the ship was released from requisition by the Minister of Shipping.

(*e*) *In re Forster's Settlement*: *Forster* v. *Custodian of Enemy Property for England* (166 L.T. 297) decided that the Custodian had no power to consent to the exercise by trustees of a power of advancement from settled funds, where the settlement required that such advancement should be made with the consent in writing of an individual last heard of as resident in enemy territory whose death could not be presumed.

(*f*) *In re de Barbe*: *Ellissen* v. *Griffith* (1942 W.N. 13). In the course of proceedings under a construction summons concerning the interest taken under a will by a person who had become an alien enemy, the Board of Trade made a statement explaining the circumstances in which they were prepared to make a vesting order in favour of the custodian of the enemy interest under the will so that the con struction point might be decided.

E. F. Q. HENRIQUES.

REVIEWS OF BOOKS

Annual Digest and Reports of Public International Law Cases, Years 1933–4 (1940), pp. xlv+527. 42*s*.; *Years* 1935–7 (1941), pp. xlix+514. 50*s*.; *Years* 1938–40 (1942), pp. xxxi+607. 55*s*. All three volumes edited by H. Lauterpacht and published by Butterworth & Co., London.

The object of this notice is to record the fact that, with the assistance of a devoted group of contributors and of the International Law Division of the Carnegie Endowment for International Peace, it has been possible to continue this Series during the War. The tenth volume of the *Annual Digest and Reports*, covering the years 1941–2, is now in the press. It will be followed by a cumulative Index and Tables of Cases for all ten volumes published so far and covering the years 1919–42.

Argentine Constitutional Law: The Judicial Function in the Maintenance of the Federal System and the Preservation of Individual Rights. By Santos P. Amadeo. Columbia University Press; Humphrey Milford, Oxford University Press. 1943. 243 pp. 20*s*.

At a time of increased interest in the international protection of the rights of man and in an International Bill of the Rights of Man, the publication of this book must be regarded as particularly opportune. The monograph is also a valuable essay in comparative constitutional law inasmuch as the author contrasts the salient features of the Argentine Constitution with that of the United States. Part I of the book gives an account of the interpretation of the Constitution by courts. Part II describes the division of powers in the Argentine Federal System. Part III deals with the protection of the rights of the individual. The monograph is a valuable contribution to the Series of Legal Studies of Columbia University.

The Eternal Refugee: Political Refugees in Ancient Greece. By Elemer Balogh. Johannesberg: Witwatersrand University Press. 1943. 12°. xvi+128 pp. (7*s*. 6*d*.)

This learned and most interesting little book was intended to form the first part of a comprehensive study of the Refugee Problem in ancient, medieval, and modern times, but Dr. Balogh, himself a refugee and cut off from libraries, has been unable to finish the whole work. Fortunately the ancient Greek evidence happens to be exceptionally full and illuminating and forms a clear-cut unity. Dr. Balogh is an accomplished jurist and has mastered the literature of his subject with impressive thoroughness; and the value of the monograph is but little affected by occasional lapses from strict accuracy in scholarship. (e.g., on page 17 the tyrannicide who is ὅσιος is not "holy" but merely "not blood-guilty", and ὃς ἂν καταλύσηι is not "one who endeavours to destroy", but one who has done so.)

The refugee problem, in a sense, is "always with us", but the conditions which lead to it and the measures taken for dealing with it vary greatly. In Greece the earliest change is from Tribal Usage to City Law. The man stained with tribal blood or polluted by some sin against the tribal gods was a complete outcast, "a bull driven out from the herd". He and his family were under a curse. In the City State this totalitarian outcasting had to be modified; on the other hand there was need for defence against a new danger which had hardly existed in tribal conditions. This was the conspirator who sought to establish a *tyrannis*, or personal government, dependent on foreign support. The presence of this danger and the violent feelings to which it led are doubtless the explanation of the curious institution of ostracism. Instead of waiting for a party conflict to break out or a crime to be committed, a vote was taken, with strict precautions against cheating, whether it would be to the national advantage that any particular person should leave the country for ten years, retaining his civic rights and even his property. The institution seems to have worked well till the later years of the Peloponnesian War, when the politicians were much too clever for it. The war had by that time produced quislings and fifth columns in most cities. Refugees mostly represented a beaten party expelled by their opponents, and a restoration of exiles a change in the political balance of power. The one shining exception to these intrigues comes, as one would expect, from Athens. The return of the Demos, led by Thrasybulus and Anytus, was celebrated by a genuine amnesty; restoration of rights, careful measures for the return of confiscated property, and no penalties except for "the Thirty and the Eleven" themselves, while even they had the choice of "giving account" of their time of office and submitting to the ordinary law.

This degree of liberality was imitated once or twice but never equalled; and we know from Xenophon of its practical success. In the fourth century restorations of exiles are fairly common, but are usually acts of force dictated by foreign powers who restore their own partisans. A famous exception is Alexander's *diagramma* insisting on restoration of exiles and general amnesty throughout the whole of Greece. The *diagramma* was evidently couched in general terms, and there are extant fairly full inscriptions showing its execution in detail in Mitylene, Tegea and elsewhere. These show the same scrupulous and elaborate provisions for the fair settlement of all foreseeable cases that we find in the arbitration treaties of the same period, and seem equally to have been brought to naught by the wars of the Diadochi. The big brute forces of the world are apt to be stronger than the good intentions of individuals. But here, as elsewhere, the attempts of the Greek cities to deal with problems which eventually baffled them are well worthy of study, and we must be sincerely grateful to the distinguished refugee who has so diligently collected and so acutely analysed the extant historical evidence.

GILBERT MURRAY.

The Law of Nations. By J. L. Brierly. Third edition. Oxford University Press 1942. viii+272 pp. (5*s.*)

In his Preface to this edition, Professor Brierly expresses a hope that he will be able to rewrite the book at a future date, as the difficulties of publication in war-time have prevented him from thoroughly revising it. Nevertheless, the book maintains its high value for both students and experts in International Law. The topic has nowadays suffered a good deal at the hands of pessimistic writers who are consciously or unconsciously blind to every aspect of it except its defects, who seem to forget that every system of law has, in the course of its history, to fight for its life against powerful antagonists, and who have nothing constructive to suggest as an alternative to this particular branch of law. Professor Brierly's book is a good antidote to the mischief that these writers perpetuate, for his learned and balanced exposition of the subject is all the more convincing because he never underrates the undoubted difficulties that International Law must overcome before those who are bound by it accept it and respect it as citizens of a civilized State do their own municipal law. A good example of this was provided by the failure of the League of Nations to prevent Italy's aggressive war that resulted in her conquest of Abyssinia. But, as is pointed out at pages 245–7, it would be a mistake to regard the incident as a demonstration of complete failure of the machinery of Article 16 of the Covenant of the League. M. Litvinov's summary of the position is accepted by Dr. Brierly.

Among recent cases referred to in "Additional Notes" (p. 265) is *Chung Chi Cheung* v. *The King* [1939] A.C. 160, where the Judicial Committee approved the.

author's criticism of the term "exterritoriality". The most significant of these "Notes" is the last one, in which Dr. Brierly states that he has left the section relating to the League system for the settlement of disputes as it stood in the second edition of his book because, in whatever form international relations are organized after the present war, the lessons of the League experiment will remain important. It is only our own personal opinion, but we would go farther and regard the Covenant of the League as the basis of international peace, though with improvements and amendments the nature of which we have indicated elsewhere.

We venture to suggest that the section on "Intervention" might take account of the fact that that term has been used in three different senses and that this is relevant to the discussion of what justifies intervention. Further, we should attach a wider scope to self-defence (or self-preservation) than limiting it almost entirely to a justification of intervention. P. H. W.

A Treatise on the Law of Prize. By C. J. Colombos, LL.D., of the Middle Temple, Barrister-at-Law. Second edition. London: Grotius Society. 1940.

The second edition of this book is indispensable to any lawyer who wishes to acquire accurate information about the law of prize as administered in the courts of the British Empire and of other maritime nations. The author has made a careful study of the authorities and the conclusions which he draws are both sound and informative. There is a good index which facilitates the task of tracking down the relevant authorities on any particular point.

The only criticism that can fairly be made is that, as is only natural in a book of its size, the present volume conveys little idea of the actual forms of procedure which are in force and must be respected when a prize case comes before the courts. The Prize Court Rules, 1939, are commented upon, but in themselves they afford little guidance to the actual practice required for bringing or defending a prize claim. Some of the earlier decisions of the present war, e.g., *The Pomona* and *The Alwaki*, find a place in the footnotes and the book is up to date to the moment of going to press.

To sum up, the volume is indispensable for any lawyer interested in prize and, within the limitations stated above, is exhaustive. It cannot and does not purport to give a full study of the actual authorities, but it is an accurate guide to the proper authorities on any given point and can be highly recommended.

P. H. DEAN.

Documents on International Affairs, 1938. (1943). Edited by Monica Curtis. Oxford University Press. Issued under the auspices of the Royal Institute of International Affairs. Vol. I, 1942. 518 pp. (35*s*.) Vol. II, 1943. 365 pp. (25*s*.)

These volumes follow the general lines of their predecessors. They are largely concerned with declarations of policy of governments. At the same time they contain a great deal of material which is of more immediate interest to the international lawyer. Thus, for instance, the long chapter in volume II (pp. 36–105) relating to the annexation of Austria contains extracts from the correspondence with Germany concerning the responsibility of the latter for the Austrian public loans. In Volume I there are interesting extracts on the recognition of the Italian occupation of Abyssinia; on the action of the League of Nations in the Sino-Japanese conflicts, including the somewhat nominal decision to apply sanctions under Articles 16 and 17 of the Covenant; the Pan-American Conference at Lima; and the correspondence with Mexico concerning the expropriation of foreign property. In general, the two volumes make sad reading. But this is not the fault of the editor, who has bestowed great care and industry upon their preparation.

Kształtowanie Elementów Państwa (*The Formation of Elements of Statehood*). By Alexander Dolski. London: F. Mildner & Sons. 1943. 186 pp.

This able monograph is written with an eye to the many practical problems which will confront the Polish State after the Second World War. The matter is presented with a clear grasp of the essential problems of statehood in its international implications. Even on questions of controversy, on which the author seems to have a clear view of his own, he expresses it in the form of queries. This applies, in particular, to his opinion on protection of minorities which he seems, perhaps rightly, to regard as inconsistent with absolute State sovereignty. However, this is not necessarily a convincing argument against the principle of protection of minorities.

Trading with the Enemy in World War II. By Martin Domke. New York Central Book Company. 1943. xv+640 pp.

Dr. Domke has done a service to both the student and the practitioner by putting at their disposal this comprehensive treatise. Although the book was written and published in the United States, it preserves an equal balance between the presentation of the law as enacted and applied in the United States and the exposition of the practice of other States. This was a formidable task at a time when access to foreign sources was becoming difficult, but Dr. Domke was fully qualified by equipment and experience alike to attempt a work of this magnitude. A survey of the successive chapters shows the wide range of subjects covered in this book. It begins with a discussion of the enemy character of governments and their agencies, of nationals of enemy countries under foreign funds control, of resident aliens of enemy nationality, of alien enemies at common law, of stateless persons formerly of enemy nationality, of internees, evacuees and prisoners of war, of enemy character of corporations, of blacklisted individuals and corporations and of persons acting for the benefit of the enemy. The question of suits by and against enemies is treated in considerable detail. So are the remedies against seizures under the Trading with the Enemy Act, the treatment of patents, trade marks and copyrights, the licensing system, and the foreign exchange control. Finally, Dr. Domke analyses carefully the various problems raised in connection with the administration of national assets abroad by governments in exile.

The Appendices, which cover nearly two hundred pages, include the United States, British and Dominion Trading with the Enemy Acts and the relevant regulations. There is a good bibliography.

The author has drawn with praiseworthy industry upon the available material. Its completeness alone makes the book indispensable to anyone concerned with the subject. It is to be hoped that in a second edition or in a supplement to the first Dr. Domke will have the opportunity to make full use of the material which has become available since the publication of the book.

H. L.

The British Commonwealth at War. Edited by William Yandell Elliott and H. Duncan Hall. Bureau of International Research. Harvard University and Radcliffe College. New York: Alfred A. Knoff. 1943. xiv+515 pp. ($5.)

This is a collection of articles of various authors, mainly on the organization of the war effort and the political conditions within the British Commonwealth of Nations in the Second World War. The articles are of undoubted value for the history of the war and of inter-imperial relations. Of special interest is the bulky contribution of Dr. Heinrich Brüning, former Chancellor of the German Reich, on the British war administration which he contrasts with the German system adopted in the Second World War.

What renders this volume of particular value to the international lawyer is the contribution of Mr. Duncan Hall on "The British Commonwealth of Nations in War and Peace". Mr. Duncan Hall, whose book on *The British Commonwealth of Nations*, published in 1920, has acquired a deserved reputation and a second edition of which is eagerly awaited, is by experience specially qualified to deal with this subject. He analyses the relation of the Commonwealth to the League of Nations and the effect of the failure of the League on the foreign policy of the Commonwealth. He throws some new light on the way in which the various parts of the Empire entered the war, and he makes trenchant, though controversial, observations on the "myth of Dominion neutrality". Most valuable of all is perhaps his chapter on the working of the constitutional bonds and the machinery of co-operation. This includes sections on the King and the Crown, the Imperial War Conference and Cabinet, on the Empire foreign policy and diplomatic system, and on Empire communications and exchange of information on foreign affairs.

With regard to the so-called problem of "automatic belligerency of the Dominions" the author—correctly, it is believed—refrains from drawing any general conclusions from the manner in which the Dominions entered the war. It is probable that the formalities accompanying their entry into the war lend themselves to interpretation supporting either of the extreme views on the subject—a useful reminder that in these matters it may be preferable not to press unduly the logic of legal conceptions. It is not clear whether the doctrine apparently acted upon by Australia and New Zealand—but not by Canada and South Africa—that "when the King is at war, we are at war", was the expression of a legal obligation or of a motive more compelling than legal principle. It is gradually becoming a truism that the inter-imperial bond is not primarily of a legal texture. This fact, it may be added, suggests that the analogy between the British Commonwealth of Nations and the possible form of international organization between States not bound by the same affinity of tradition and interest is negligible.

H. L.

The Residence and Domicile of Corporations. By A. Farnsworth, Ph.D., LL.M., of the Inland Revenue Department. With a Foreword by Lord Macmillan. London: Butterworth & Co. 1939. xxxvii+370 pp. (21*s*.)

Lord Macmillan states in his Foreword that "no one in future who has to deal with the problems discussed in these pages will be properly equipped for his task unless he has studied this admirable monograph", but reminds the reader that "the application to corporations, which are artificial persons, of conceptions which are primarily applicable to natural persons is beset with the perils which attend the use of analogies in law".

The blurred notions of "domicile" and "residence" of corporations have been used to found (1) jurisdiction to tax them (compare Harding, *Double Taxation of Property and Income*: Harvard Studies in the Conflict of Laws, vol. 1 (1933), p. 138), and (2) jurisdiction for suits *in personam* against them (Cook, *The Logical and Legal Bases of the Conflict of Laws*: Harvard Studies, vol. 5 (1942), Ch. VII). Both problems could, it is submitted, be solved without recourse to the fictions of domicile and residence. The exhaustive study made by Dr. Farnsworth (see particularly his conclusions on pp. 194–200 and 273–5) is of great value and makes one hope that instead of discussing "domicile and residence of corporations", rules for "jurisdiction to tax and sue corporations" will be laid down in municipal legislation. The solution of the burning problem of double taxation by international conventions will certainly be made easier if the notions "domicile and residence of corporations" (which are determined by each system of municipal law in accordance with its own rules, possibly conflicting with the respective rules of other legal systems) were eliminated.

Vladimir Idelson.

The International Economic Law of Belligerent Occupation. By E. H. Feilchenfeld. Published by the Carnegie Endowment for International Peace. 1942. xii+181 pp.

"The present study embodies a comprehensive though brief survey of the positive law which, at the outbreak of the present war, governed the economic and financial problems arising from belligerent occupation" (p. 3). The author rightly claims that his study "constitutes the first attempt to present a coherent survey of the international economic law of belligerent occupation" (p. 10). "In view of the special emphasis of this study on economic problems a detailed treatment of some legal problems (for instance, powers of the occupant to change 'political laws' as distinct from fundamental institutions) is omitted" (p. 89).

The author points out that the Hague Regulations of 1907 "were a late codification of a body of law adopted in the atmosphere of the nineteenth-century liberalism, shaped by the basic philosophy of that era, and drafted for the conditions of a nineteenth-century liberal world. They had to be applied, shortly after their adoption, in a world in which fundamentally different thoughts and conditions became increasingly prominent" (p. 17). Soon "the gaps in the Hague Regulations and their vagueness on important points" (p. 21) became apparent.

Two new factors have to be noticed: (1) a changed notion of private property (p. 17) and (2) the tendency to revive wars of extermination in a new form of "permanent or quasi-permanent economic ruination" (p. 13) or "total warfare" (p. 19). This book of Dr. Feilchenfeld—an admirable and most valuable contribution to the study of the law of occupation—shows how under these new tendencies "protection of civilians in occupied regions provided by the Hague Regulations is becoming a limited survival rather than the expression of universal trends and practices" (p. 21).

VLADIMIR IDELSON.

An Analytical Index to the American Journal of International Law and Supplements, Volumes 15 *to* 34 (1921–40) *and the Proceedings of the American Society of International Law*, 1921–40. Prepared by George A. Finch. Washington, D.C. 1941. 645 pp.

In a Prefatory Note to this Index Mr. Finch states: "It may be truthfully said that no international incident of consequence which has occurred and no question of international law worthy of mention are omitted from treatment in the Society's publications". There ought to be no dissent from this statement. The *American Journal of International Law* has established itself, almost from its very inception, as the leading and the most useful periodical publication in the field of international law. The range of its articles and notes, its bibliographies and book reviews, its chronology of events and its Supplement giving the most important international documents, have made it an indispensable instrument of work. The absence of any editorial restriction upon expression of opinion has made it the forum of widely divergent views and of stimulating discussion. The student of international law is under a heavy obligation to the American Society of International Law and to the author of the Index for a work of obvious usefulness and thoroughness.

H.L.

Justice for my People. By Dr. Ernst Frankenstein. London: Nicholson & Watson. 1943. 185 pp. (7*s.* 6*d.*)

Dr. Frankenstein's name as an authority on private international law and jurisprudence is well known, and this fact alone justifies notice of a book in which the author admittedly appears as a champion of a political cause. Apart from this tendency, the book is an interesting and valuable contribution to the history and the interpretation of the Palestine Mandate—the most controversial and most difficult problem of mandatory government.

Studies in Government and International Law. By James Wilford Garner. Edited, with a Biography, by John A. Fairlie. The University of Illinois Press. 1943. 574 pp. ($7.50.)

All those who admired Professor Garner's contribution to the science of international law, his independence of thought and his high intellectual integrity will be grateful to Professor Fairlie for the present collection of articles. Some of them appeared in periodicals which are not easily accessible. These include the articles on the Study of International Law in the Countries of America (Proceedings of the Second Pan-American Scientific Congress, 1915); on the German War Code (the University of Illinois *Bulletin*, 1918), on the International Regulation of Air Warfare (*Air Law Review*, 1932); and on the Revision of Treaties (*Iowa Law Review*, 1934). Most of the other articles appeared in the *American Journal of International Law*. In any case, it was fitting that Professor Garner's work, other than that which appeared in book form, should be thus collected and prefaced by an admirable biography.

Transactions of the Grotius Society. Volume 26. (1941), 260 pp.; International Book and Review Publishers Ltd. and Sweet & Maxwell Ltd. (10*s.*) Volume 28 (1943), 176 pp.; Sweet & Maxwell Ltd. (15*s.*)

In spite of many adversities the Grotius Society continued its good work of affording "facilities for discussion of the laws of War and Peace and for interchange of opinions regarding their operation". The three volumes of Transactions containing the papers read between 1940 and 1942 prove both the need for and the usefulness of these activities. It is to be hoped that they will be not only continued but also extended: the presence in England of so many lawyers from foreign countries gives unique opportunities of serving the Society's paramount object, viz., as its late Hon. Secretary has put it, "the advancement of mankind towards the reign of law and order which seems as yet distant".

The three volumes contain more than twenty lectures and addresses which can only be noted here, but which it would be presumptuous to attempt to discuss within the available space. Some of them treat war-time problems: Bisschop, "The *Altmark*"; E. J. Cohn, "The Problems of War Crimes To-day"; Sir A. D. McNair, "Effect of War upon Contracts"; Friedmann, "International Law and the Present War"; R. Kuratowski, "International Law and the Naval, Military and Air Force Courts of Foreign Governments in the United Kingdom". Others are concerned with wider problems of international law: Hales, "The Reform and Extension of the Mandate System"; Jenks, "The Significance To-day of Lorimer's Ultimate Problem"; Schwarzenberger, "The Aid Britain Bill and the Rights and Duties of the U.S.A. as a Neutral Power"; Keeton, "International Law and the Future"; Weis, "International Criminal Justice in Time of Peace"; Goodhart, "International Law and the Causes of War". A third group is devoted to specific problems of a more technical character: Jenks, "Some Legal Aspects of the Financing of International Institutions"; Bisschop, "Nationality in International Law"; Rankin, "Legal Problems of Poland after 1918"; Loewenfeld, "The Mixed Courts in Egypt and the Status of Stateless Persons"; Mervyn Jones, "Modern Developments in the Law of Extradition"; Lipstein, "Conflict of Laws before International Tribunals". Many of these papers will be found to be of very great value.

The 1942 volume also contains the reports on "International Law in Development", or, as the title was later formulated, "The Future of International Law", which were initiated in 1940 by Dr. Bisschop's Paper on "Sources of International Law". The discussion of these reports extending over 100 pages shows the complexity of the problems involved, without always contributing to their clarification.

F. A. MANN.

International Labor Conventions. By Colney Hall Dillon. University of North Carolina Press. xii+272 pp. 1942. ($3.)

This study by Professor Dillon, the Head of the Department of Political Science in Marshall College, Huntington, West Virginia, contains much that is of interest to anyone who is concerned with the activities of the International Labour Organization. It has, however, a special interest for lawyers. The remarkable success of the Organization is largely due to its good fortune in being launched upon its career by men possessing the diverse qualities of M. Albert Thomas, Mr. Harold Butler and others who could be named, but a large share of credit is due, in my judgment, to the imaginative work of the architects of its Constitution, who included certain distinguished British civil servants. In point of diplomatic and legal technique it has broken new ground from the beginning and, under the stimulus of the fertile minds of those responsible for its direction, it has invented its own legal machinery as its course has proceeded instead of allowing its progress to be held up by legal obstacles, as has happened too often in international affairs. It is this factor that attracts the attention of the lawyers, and Professor Dillon has rendered a valuable service by collecting and commenting upon a large amount of legal material relating to the Interpretation and the Revision of Labour Conventions, their application by national courts, their true legal character, and a number of other legal questions to which they have given rise, such as conditional ratifications, the unanimity rule, the effect of the coexistence of original and revised Conventions, etc.

A. D. McN.

The International Law of the Sea. By A. Pearce Higgins and C. John Colombos. London: Longmans Green & Co. 1943. 647 pp. (42*s.*)

The late Professor Pearce Higgins made maritime law a subject of his special interest. Dr. Colombos's high standing as an authority on Prize Law is well known. This combination has resulted in a text-book of a high degree of scholarship and of great lucidity of exposition. The book is almost equally divided into maritime law in peace-time and the rules of sea warfare. The first has chapters on the high seas, territorial waters, bays and gulfs, straits and artificial canals, rivers, the legal régime of warships and merchant vessels, and on international regulation of navigation, shipping and overseas communications. Part II of the treatise is devoted to an exposition of the law of the sea in time of war and is essentially a book on prize law. Dr. Colombos has succeeded in a striking manner in combining the historical aspect of the treatise—which is largely the contribution of Professor Pearse Higgins—with the determination to make of it a thoroughly up-to-date instrument of work for the student and the practitioner. There is hardly any modern case or event which has escaped his attention.

The treatise will probably see many editions. This being so, Dr. Colombos may consider the advisability of expanding the part covering the law of peace at the expense of the law of war (or even without such adjustment, for the book could be enlarged by one or two hundred pages without becoming unwieldy). If this treatise is to become even more indispensable than it is at present to the practitioner—e.g., shipping offices or captains of ships—the sections bearing on such matters as international co-operation for securing the safety of the sea routes or the protection of fisheries ought to be presented in greater detail. It would add to the usefulness of the book if the principal conventions were included as an Appendix. Some of the subjects could be elaborated with advantage. This applies, for instance, to the *I'm Alone* case (on p. 106), the account of which does not sufficiently bring out the principal points of legal interest involved in the dispute.

It is a matter of congratulation to all concerned that the labours of Professor Pearce Higgins have not been allowed to remain in obscurity and that they should have been linked up with a scholarly product of that competence and care to which Dr. Colombos has accustomed us.

H. L.

World Court Reports. Vol. IV. 1936–42. A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice. Edited by Manley O. Hudson. Published by the Carnegie Endowment of International Peace, Washington. 1943. xvi+502 pp. ($2.50.)

This is the final volume of a series edited for the Carnegie Endowment for International Peace by Judge Manley Hudson. The three preceding volumes recorded the activities of the Court from 1922, when it was established, to 1935. The final volume brings the record up to date and covers the work of the Court from 1936 up to 1940, when it was interrupted by the invasion of the Low Countries. The volume contains eight judgments and sixteen Advisory Opinions, and to the full text of the Court's judgments, orders and opinions Judge Hudson has added extensive editorial and bibliographical notes. This he has done with that painstaking and accurate scholarship which students of international law have learnt to associate with his name. Judge Hudson's work before the outbreak of the present war in making known the importance and value of international institutions, especially judicial institutions, is well known. It is certainly fitting that these volumes should stand as a monument in our time to the service rendered by the learned editor to the Permanent Court of International Justice, first as an ardent supporter of it in his own country, and finally as a distinguished member of its Bench.

Wheaton's International Law. Seventh English edition. By A. Berriedale Keith, D.C.L., D.Litt., Hon. LL.D. Vol. 2—War. London. 1944. Stevens & Sons Ltd. xxviii+672 pp. (50*s.*)

The sixth edition of *Wheaton* by Professor Keith appeared in 1929. The seventh (heralded by Volume 2 on War—Volume I on Peace will appear later) is ushered into a vastly different world from that which the international lawyer surveyed in the last year of a decade of uneasy peace. The initial assumption of the laws of war which had held good since the time of Grotius—above all, the distinction between combatants and non-combatants—could still be stated in spite of the severe strain to which they had been subjected in the 1914–18 war. The present war has raised a great issue: how far, with any appearance of support from the practice of states, can these assumptions be repeated—how far, indeed, is it possible to subject modern warfare to the humanizing influence of the rules of law? Little of this sort of speculation appears in the pages of this edition, which expounds the laws of war on traditional Grotian lines. The Grotian tradition was, however, founded on a belief that the basis of the laws of war, as of international law as a whole, was a moral or "natural" law governing the actions of governments viewed not as abstractions but as human beings. In modern times there has developed a tendency to sever international law from its moral roots, to be content with stating what governments have "agreed" to do or not to do, and to allow it to be regarded as a collection of mere conventions. So much has this been the case in relation to the laws of war that the absurd position is reached of justifying breaches of hitherto accepted law as a "development" of the law on new lines. Only thus was it possible to maintain the view that international law was "nothing more" than the practice of states. The uncritical acceptance of that practice was all the more strange in the case of lawyers bred in the common law tradition with a highly developed doctrine regarding the formation of custom.

This second volume is edited with all the wealth of detail and references which we have learnt to expect of Professor Keith's undertakings. It would be ungenerous to dwell upon the disadvantages of engaging in such a task at such a time; the editor enlists our sympathy and admiration for his courage in assuming the burden. Occasionally, however, the incorporation of the earlier texts with contemporary material presents obvious difficulties. Thus, at page 175, the editor writes: "In the war of 1939 the civil populations were relentlessly oppressed by Germany and Italy". This is undeniable, but the bare statement of fact does not work in readily with the discussion of the doctrine of "levy *en masse*" which the book contains at this point. (A similar disjointed impression is created by the reference to Fauchille, page 350, note 9, in relation to an observation about the practice of the 1939 war; at page 624, note 20, the application of the doctrine of *ius postliminii* to the reconquest of Ethiopia is not developed.) The operation of the law of prize has been considerably affected by executive action in the present war; but the original text contains so much historical material that no adequate impression is conveyed of this. The Prize Salvage Act, 1944, was passed after this volume went to press and consequently its implications are not discussed.

Of the most important development in the present war—mass "area" bombardments or bombardments of whole cities—Professor Keith says very little. Three pages (350–3) contain an unsatisfactory discussion. Nevertheless, this development reveals the extent to which the distinction between combatant and non-combatant has been assailed. The issue thus raised is whether there is any fundamental principle on which rules of air warfare may be based. But on this issue Professor Keith is silent.

The volume as a whole is admirably done within the limits aimed at. At the same time it cannot fail to prompt the reflection that it is time English jurists broke away from "ancestor-worship" in text-book literature. In no country save England would it seem possible to bring out repeatedly fresh editions of legal works of considerable antiquity. Wheaton was first published in 1836, transformed by Dana in 1866, and first published in England in 1878. In the present century we have seen only three completely original works on public international law—Oppenheim, Westlake, and Brierly. Of these, only one appeared for the first time since the 1914–18 war. Dr. Cheshire has broken this evil tradition in *Private International Law*. May not the study of Public International Law be similarly freed from the tyranny of mortmain?

J. M. J.

International Legislation: A Collection of the Texts of Multipartite Instruments of General Interest. Edited by Manley O. Hudson. Vol. VII. 1935–7. Washington: Carnegie Endowment for International Peace, 1941.

There can be few volumes of greater importance to the student of contemporary international law who is concerned with "actualités" than those edited by Judge Hudson under the once daring title of *International Legislation*. The nature of the texts collected in them is sufficiently indicated by the title. They are all texts of some practical importance; and it can hardly be doubted that in the course of time this mass of treaty law will have its influence on international law as a developing system. In the volume under review the three years beginning in 1935 and ending in 1937 are covered. To take an example at random the Convention concerning the Reciprocal Recognition and Enforcement of Judgments signed at Kaunas on November 14, 1935, cannot be ignored by future students of the subject even from a theoretical angle. In this volume, too, will be found such treaties of general interest as the Convention concerning the Régime of the Straits, the Convention for the Prevention and Punishment of Terrorism, the Convention for the Creation of an International Criminal Law, the Agreement on the International Tin Control Scheme, and many others which surely touch upon fundamental principles of international law and organization. There are the usual execellent bibliographical notes.

J. M. J.

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60. Selected and arranged by William R. Manning. Vol. XI—Spain; Vol. XII—Texas and Venezuela. xlii+1017 pp. and xxxiv+858 pp. Washington: Carnegie Endowment for International Peace, 1939.

For the student of affairs diplomatic correspondence always makes fascinating reading. Quite apart from the intrinsic interest of the subject-matter, the tactics of diplomacy, the use of argument on a high level, the presentation of a case and the answer to it—all repay study. Such collections as these volumes, however, very frequently contain much that is of great interest and value to the international lawyer.

Volume XI covers a critical period in the history of the relations of Spain with her colonies and of the effect of public opinion in the United States upon the policy of the Government towards Spain. Questions arising out of the slave trade and filibustering expeditions against Cuba figure prominently in this volume. A series of despatches is concerned with the proper definition of piracy and the limits of the right of visit and search. Particularly interesting in connection with the latter is the correspondence about the seizure by the Spanish authorities of the American vessel, the *El Dorado*, in which we find discussed the measures which a State may take on the high seas against a foreign vessel on grounds of security. The complete correspondence relating to the *Creole*—an incident often related in source-books on international law—is here set out for the first time in an accessible form. Free access to the ports of a foreign nation is a right which occupied the minds of international lawyers as soon as the political doctrine of free trade began to develop. An interesting correspondence arose in this connexion as a result of the refusal by the Spanish authorities in Cuba of permission to the American vessel *Crescent City* to enter the port of Havana or to deliver mails or passengers destined for that island. The Spanish Government in its reply to American protests on this subject took the point that the vessel carried on board "a man who according to the information of those authorities"—i.e. at Cuba—"had fomented by his writings the conspiracies against the island". Both governments recognized "the right which every nation has of establishing the conditions which it may judge proper for the admission into its ports of foreign vessels", and that these conditions "ought not to be incompatible with the received commercial usages among the nations". The application of these principles to the facts in question makes instructive reading. Matters relating to the responsibility of states arise frequently in this volume. In particular the liability of a government to make good damage done to the property of aliens by violence, the duty to suppress preparations on its territory for the overthrow of the government of a State at peace with it, the proper treatment of aliens under arrest and imprisonment, State responsibility for the actions of customs officials (the *Black Warrior*) and similar matters.

Volume XII contains correspondence covering the relations of the United States with Texas and Venezuela. In the part relating to Texas much of the material deals with political and economic questions arising from the separation of that State from Mexico. During the period when Texas was an independent State a number of border incidents and boundary questions arose which touch upon the responsibility of states. Much of the correspondence is, however, concerned with the proposed annexation of Texas by the United States. The bulk of the correspondence between the United States and Venezuela is concerned with a question raising issues familiar to every student of international law. This was the question of the occupation by American citizens of Aves Island for the purpose of extracting and exporting guano. The Venezuelan authorities forcibly expelled them from the island and the United States Government presented on their behalf a claim for compensation. Much learning on the subject of occupation of supposedly "derelict" territory is to be found in the ensuing correspondence. The Venezuelan Government relied on its right as general successor to Spain in order to establish its claim to sovereignty over the island. The subject of title by discovery and contiguity, the meaning of "possession", the value of arguments derived from charts, etc.—all these matters are discussed with many references to Kluber, Wheaton, Merlin and other writers. The Venezuelan Government maintained: "The United States did not commission the Americans in question to occupy the island of Aves and to take possession of it in their name. Thence it is clear that they could not hoist thereupon the flag of their country nor assume authority to say that they acted in its name. . . . Reduced therefore to the class of mere private persons they did not possess the faculty of acquiring it as inherent in Nations." The United States on the other hand asserted that the island was *res nullius*. The correspondence touches upon the measure of damages in claims of this kind. When the claim was first presented an item was included in respect of "loss of probable or prospective profits" in addition to expenses and damage to actual establishments set up by the claimants on the island. According to the Venezuelan minister no heavy expenses were incurred: "There were not more than a dozen of huts frame built, a sort of wharf, some sixty or eighty wheelbarrows, the necessary spades. . . ." "What the value of the huts was—all of them built of old stuff—may be inferred from the fact that the best of them was sold by its owner for the price of one pound sterling." The argument was, however, pursued by both governments for several years with great ability and learning until finally Venezuela consented to make an "equitable arrangement". On the measure of damages it is interesting to note that the United States Government finally adopted the principle of restricting the claim to the "actual positive losses inflicted" and "excluding all hypothetical and consequential damages". On this principle a settlement of the whole claim was reached at 200,000 United States dollars.

J. M. J.

Diplomatic Correspondence of the United States. Canadian Relations, 1784–1860. Edited by William R. Manning. Vol. 1, 1784–1820 (1940), 947 pp.; Vol. II, 1821–35 (1942), 1016 pp.; Vol. III, 1836–48 (1943), 1189 pp. Published by the Carnegie Endowment for International Peace.

These three volumes show, perhaps even more clearly than the other volumes of the *Diplomatic Correspondence of the United States*, the full significance and usefulness of Dr. Manning's monumental undertaking. Most of the documents reproduced in these volumes are printed for the first time. Together with those previously available, they throw new light on many a question. This applies in particular to the Caroline incident (in volume III) and to the interesting story of the rejection of the award of the King of the Netherlands in the matter of the north-eastern boundary. There is also in these volumes a wealth of material on the subjects of discovery and occupation of territory and river navigation.

The various volumes of the entire series edited by Dr. Manning cover most subjects of international law. It is not certain that under the present arrangement of the Index they are as useful to the student as their contents warrant. At present the indices contain references mainly to names. They are not an analytical guide to subjects from the point of view of their legal interest to the international lawyer. It is only by way of exception that the Index, as at present arranged, contains references of this nature as is the case, for instance, with regard to "piracy" in volume III. In connection with the Nyon Agreements of 1937 for the suppression of attacks, there described as piratical, by submarines of unknown nationality, the question was discussed whether that designation can properly be applied to acts other than that of piracy committed *animo furandi*. In connection with the Caroline incident the British Government spoke repeatedly of "British Rebels and American Pirates" and insisted repeatedly that the use of the latter expression was proper in the circumstances. But the Index contains only one reference to the matter, and even this is exceptional. It may perhaps be a subject for consideration whether the time has not come for a cumulative and analytical Index of the volumes published so far under the scholarly and painstaking editorship of Dr. Manning.

H.L.

The International Conferences of American States. First Supplement 1933–40. Collected and Edited in the Division of International Law of the Carnegie Endowment for International Peace. Washington. 1940. 558 pp.

This Supplement includes the Final Act and the Conventions of the Seventh and Eighth International Conference of American States, of the Inter-American Conference for the Maintenance of Peace of 1936, and of the First and Second Meetings of the Ministers of Foreign Affairs of the American Republics. There are also useful Synopses of Technical Pan-American Conferences as well as of Pan-American Commissions and other bodies. In an illuminating Introduction Mr. Finch, the Director of the Division of International Law, gives a general but penetrating account of the character of the Pan-American Union and of the bodies established under its aegis. Unlike some enthusiasts of the Union, he does not claim for it a political importance which it does not possess. For this reason he seems to approve of the doctrine of juridical equality of all the members of the Union. In an association of States in which the element of authority and of effective political action for the enforcement of peace is rudimentary, there is full scope for the maintenance of the doctrine of equality of states in all its implications. The Division has performed a signal service is bringing out this carefully edited survey of Pan-American co-operation.

The International Labour Code 1939. A systematic arrangement of the Conventions and Recommendations Adopted by the International Labour Conference 1919–39. With Appendices embodying other standards of Social Policy framed by the International Labour Organization. Montreal. 1941, lvi+920 pp.

Amidst the kaleidoscopic changes in the world of international relations the International Labour Organization stands out as one of the few institutions of which it can be safely predicted that they will survive this war. The ideas which underlie its constitution and the methods which it has used in putting them into practice are likely to gain a much-increased importance—perhaps far beyond the original scope of activities of the I.L.O. itself. While, therefore, the I.L.O. can be said to represent an element of continuity in the rapid current of contemporary developments, the outbreak of the war was nevertheless bound to mark a milestone in its history. It was an opportune moment for stocktaking and for the preparation of a systematic conspectus of its achievements.

The monumental work which is the fruit of the gigantic labour of Mr. C. W. Jenks, the Legal Adviser of the I.L.O., and of his predecessor, M. Jean Morellet, is modestly introduced as "a coherent presentation of the substance of the texts of the conventions and recommendations adopted by the International Labour Conference which constitute the so-called Code, accompanied by appendices embodying other standards of social policy adopted under the auspices or with the co-operation of the International Labour Organization, and by explanatory and bibliographical annotations." This description hardly conveys an idea of the magnitude of the service rendered by the authors of this volume to all those interested in labour relations and in international law. For the first time the whole *corpus* of standards set up by the I.L.O. has been made easily accessible. More than that, the immense amount of material contained in the various series of Records of Proceedings, Reports and Minutes, and, above all, in the "Studies and Reports", in the volumes of the *International Labour Review* and in other I.L.O. periodicals, has been co-ordinated and summarized in systematically arranged footnotes to the provisions of the "Code". The authors have performed the dual function of "codifiers" and "commentators". They have produced not only the "Codex" but also the "Gloss".

From the legal point of view this is, of course, neither a codification nor a consolidation. It is not a source of law. The authoritative texts of the Conventions remain in force, but they are—with slight verbal alterations—reproduced in the Code, together with the Conference Recommendations. They have been stripped of the by-work—preambles and protocolary provisions—which is of vital importance to the lawyer, but conveys little to the student of the substance of the "standards". The work might therefore be compared with some of those "Digests" and "Restatements" which have often paved the way towards a codification and simplification of the law itself, or, perhaps more aptly, with those unofficial systematic collections of Imperial constitutions which preceded the Theodosian and Justinian *Codices*.

The difficulty of the achievement was accentuated by the fact that International Labour Law, like its municipal counterpart in most countries, has grown in a haphazard fashion. Whether or not a given area in the field of industrial relations is to be covered by "law", is a decision influenced almost entirely by industrial power politics. The absence of "law" (in the orthodox sense) may indicate a very high standard of labour conditions: where the autonomous representative organizations of the workers are capable of enforcing those standards through their own strength, they will be reluctant to invoke the assistance of "legislation"—international or municipal. Hence the prevalence in the International Code of provisions designed to protect agricultural labour—it is not without significance that the only Convention quoted in the key section on "Industrial Relations" refers to the equal treatment of agricultural and industrial workers. However, the absence of legislation may also arise from the weakness of organized labour and its inability to resort to political action: the denunciation of the Unemployment Convention, 1919, by the Government of India tells a significant story. As a result of this frequently lopsided growth of international standards we find that vast tracts of land—the law relating to the contract of employment itself, to wages and their payment, to collective bargaining, conciliation and arbitration, to workers' representation in factories, mines and offices, etc.—have remained almost virgin soil, while others—hours of work, protection of women, children and young persons, industrial health, safety and welfare, and various branches of social insurance—have been subject to more or less intensive cultivation. To arrive at an orderly and systematic arrangement of so unsystematic a body of principles was no easy problem, and the authors deserve high credit for having solved it.

They deserve it all the more in view of two special obstacles which beset their path: one was the perennial problem of arrangement *ratione materiae* versus arrangement *ratione personarum*, the other one, more formidable, the fact that they had to cater for two different types of readers and users of their work.

The first of these two obstacles has been overcome—as was almost inevitable—by a compromise, the terms of which are, however, more favourable to the criterion of subject-matter than to that of the personal scope of application. The Code is divided into twelve "Books". Books I to VIII are arranged according to the content of the legislation involved. They deal with: Employment and Unemployment; General Conditions of Employment (Wages, Hours, Weekly Rest Periods, Holidays with Pay); Employment of Children and Young Persons; Employment of Women; Industrial Health, Safety, and Welfare; Social Insurance; Industrial Relations; and Administration of Social Legislation (Labour Inspection). The twelfth Book which deals with Statistics and Other Information falls into the same category. The three remaining Books, however, and the Fourth Appendix are devoted to special categories of persons whose labour relations could not easily be fitted into a scheme of arrangement *ratione materiae*. They contain The International Seamen's Code (the international counterpart to the labour sections of the Merchant Shipping Acts), Standards of Colonial Labour Policy, Migration, and what may be called the *Codex Asiaticus*, i.e. the sum total of those "modifications" of certain conventions which adapt their application to India, China, Japan, and other Asiatic countries. There is also—in Appendix V— a *Codex Americanus* which contains a number of resolutions passed by the regional conferences of American States at Santiago (1936) and Havana (1939). The books of the Code itself are conveniently subdivided in Titles, e.g., the book which deals with Children and Young Persons consists of the three Titles: Age for Admission to Employment, Vocational Training and Apprenticeship, Employment during the Night. Each Title is divided into chapters (consecutively numbered throughout the Code), and each Chapter into Articles which give the wording of the Obligations and Recommendations. The present reviewer has made a number of tests and found that he was able in the shortest possible time to discover any material in which he happened to be particularly interested.

The other difficulty with which the authors had to contend was that they were addresssing themselves not only to the lawyer who asks: "How far has the I.L.O. succeeded in making new International Law?", but also, first and foremost, to the social reformer, to the trade unionist and to the employer, to the prospective municipal legislator who consults the Code with a view to discovering those standards of social policy which the Organization has sought to enforce (successfully or not). For the benefit of the lawyer each "chapter" has been sub-divided into two sections: Obligations (i.e. Conventions) and Recommendations, and, in the case of the former, the ratifications have been noted in footnotes. The lawyer will also find summaries of, and extracts from, the interpretations given to the conventions by various international authorities, chiefly by the Permanent Court of International Justice, but also by various organs of the I.L.O. itself. What the authors in their illuminating "explanatory note" call the "student of standards" (in contradistinction to the "student of obligations") receives his due not only through the omission of obsolete material, of preambles, protocolary provisions, etc., and the special treatment given to revised conventions and recommendations, but in the form of a wealth of material contained in the footnotes. They include reports of those cases in which representations as to non-observance of a ratified Convention have been made to the Governing Body, references to the Summaries of Annual Reports which give an account of the way in which the members of the Organization have lived up to the standards set up by the I.L.O. (whether they were under a legal obligation to do so or not), references to the specific requests made from time to time by the Governing Body to the Members for information as to the application of Conventions, and to the answers, and, last but not least, a vast amount of preparatory work: reports by the Office to the Conference, extracts from unpublished Committee reports, details of proposals which failed to find favour with the requisite two-thirds majority of the Conference.

Throughout their work the authors have shown themselves aware of the fact that—in their own words—"the standard-defining function of the International Labour Organization has tended from the outset to outgrow the limitations of the procedure provided for by the Constitution of the Organization, and less formal procedures have been developed to supplement them". If one may use so hackneyed a word: the Code deals with Labour Law in a "dynamic" fashion, it shows the law as a growing body, not as a fixed pattern. The Appendices are a thesaurus of informal resolutions adopted by the Conference, standards approved by a large number of Conferences and Committees under the auspices of the I.L.O., reports of similar bodies (concerning economic and social problems of the textile industry, the coal mining industry, and agriculture), labour clauses in a number of League of Nations instruments with which the I.L.O. was only indirectly concerned, texts of proposed conventions on hours of work which the Conference had to postpone in 1939, lists of questions now pending, and—a priceless gift to the lawyer—a complete list of all existing bilateral and plurilateral international agreements which deal with labour.

The I.L.O. can indeed be proud of its achievements and they cannot be blamed for printing—by way of contrast—the meagre "International Labour Code" which was in existence when the first World War broke out, i.e. the Resolutions and Protocols of the International Labour Conferences of 1890 and 1913, and the Berne Conventions of 1906.

The authors of this volume have successfully striven not to be impeded by the strait-jacket of a narrow legalistic definition of "standards", they have given an impressive picture of the growth of conventional as distinguished from legal "law" under the auspices of the I.L.O., and their copious (one is inclined to think exhaustive) quotations from the numerous publications of the I.L.O. show how that body has succeeded in stimulating work and thought in this field. Even so, the work gives but an incomplete survey of what the I.L.O. has done. By way of preface to the Book on Industrial Relations the authors remind us that "the work of the I.L.O. in the field of industrial relations has consisted of the development of techniques of international inter-group discussion and negotiation, of giving a stimulus to the development of effective organizations of employers and workers in many countries and to the growth of systematic co-operation between such organizations, and of issuing numerous publications relating to industrial relations and cognate questions, rather than in the formulation of international obligations or standards of policy". Indeed, even the *magnum opus* under review cannot convey an idea of those vast, though less conspicuous, contributions which the I.L.O. as a purely administrative body has made during the inter-war period. Of its legislative and standard-creating function, however, the world has now received a masterly account. The builders of the future cannot blame the planners of the foundations if they fail in erecting the edifice.

O. KAHN-FREUND.

Intergovernmental Commodity Control Agreements. Published by the International Labour Office. Montreal. lviii+221. (8*s.*)

This valuable publication contains the text of a number of intergovernmental agreements regulating the production and distribution of wheat, sugar, tea, coffee, tin, rubber and cotton, and interesting material concerning commodity control in general; it includes, e.g., the resolutions of various conferences, the statements announcing the creation of such wartime agencies as the Combined Raw Materials Board, the Combined Production and Resources Board and the Combined Food Board, and the UNRRA Agreement of November 9, 1943, as well as a selection of Wartime Commodity Purchase and Reserve Stock Agreements. International lawyers will be grateful for the publication of this interesting material, most of which is not readily available elsewhere. It proves that in many fields involving technical administration, as opposed to "political" matters, international law is efficiently discharging important functions, and it extends an invitation to lawyers to devote greater attention than in the past to that much-neglected body of economic international law which is already in existence and may become the nucleus of wider schemes of the future.

The International Labour Office, whose interest in the problem of commodity regulation springs from its concern with the social consequences of commodity control schemes, or their absence, and particularly of price fluctuations, has provided an Introduction of fifty-eight pages which, both as regards presentation and documentation, is typical of the high standard of research characterizing all the office's works. The Introduction traces the development of Intergovernmental Commodity Control Schemes and the existing statements of policy and then proceeds to formulate the guiding principles which should determine future policy. Under the heading of Institutional Arrangements it advocates the creation of a general international commodity control organization for which it makes some convincing suggestions. In a concluding paragraph reference is made to the legal and financial questions to be considered. The Office indicates its view that, in future, schemes should be established "by some international decision, such as a charter issued by or an organic statute adopted by the general commodity control organization rather than by intergovernmental agreements of the type customary hitherto". It also deplores the highly indeterminate legal status enjoyed at present by the control authorities and cautiously describes it as likely that they should be given legal personality—a term which, unfortunately, the authors do not define, but by which, it is hoped, they intend to refer to the conception of the public international corporation rather than the municipal corporation. The Office sees clearly that it would be undesirable, if, as a consequence of such corporate character, the authorities became subject to the jurisdiction of the courts of any one country, and suggests the establishment of some international commercial court.

It may be hoped that these and many other points made with restraint yet authority will have the influence upon the shape of things to come to which they are entitled.

F. A. Mann.

The International Experiment of Upper Silesia. A Study in the Working of the Upper Silesian Settlement 1922–37. By Georges Kaeckenbeeck, D.C.L. Oxford University Press. Issued under the auspices of the Royal Institute of International Affairs. 1942. xxxi+867 pp. (£2 2*s.*)

The original conditions of peace which at the end of the last war were communicated to Germany by the Allies envisaged the unconditional cession of Upper Silesia to Poland. It was due to German protests that the Treaty of Versailles provided for partition based on a plebiscite in the disputed area. The plebiscite took place on the 20th March 1921. On the 20th October 1921 the Conference of Ambassadors held in Paris fixed the frontier in accordance with the result of the plebiscite. In Article II of their decision they enjoined the German and Polish Governments to conclude a Convention to give effect to a variety of provisions relating to the incidents of the cession and, in many respects, involving, for a transitional period of fifteen years, a system of supervision by a Mixed Commission and an Arbitral Tribunal. The Convention, elaborating these terms and comprising 606 Articles, was concluded on the 15th May 1922 at Geneva and came into effect a month later. Throughout the period of fifteen years ending in 1937 the author was President of the Arbitral Tribunal. He therefore had a unique opportunity of both influencing and observing the working of an equally unique experiment in international administration. In the present work he has presented a richly documented and highly interesting *résumé* which will require the close attention of all concerned with international relations and international law.

Apart from a detailed description of the political and economic background of the partition and its historical development, indices and texts of the material diplomatic documents, the work contains seven principal chapters dealing with the main problems. The second title of the Geneva Convention, under the heading of "*Protection des droits acquis*", contained the famous Article 4 by which Germany and Poland undertook to "recognize and respect the rights of every kind, and in particular concessions and privileges acquired before the transfer of sovereignty by private individuals, companies or bodies corporate in their respective parts of the plebiscite area in conformity with the laws relating to the said rights". The impact of this provision has already been extensively discussed by President Kaeckenbeeck in the *British Year Book of International Law* of 1936 and in The Hague *Recueil des Cours* of 1937 (vol. 59). Moreover, the present work throws much new light on a difficult subject. The author then proceeds to discuss the change of nationality and rights of residence; the protection of minorities; labour organization and social insurance; economic and technical problems; organization and procedure of the international organs. He concludes with a very important chapter stating his general conclusions.

It would be futile to select individual questions referred to by the author for discussion in the course of a review. It may be more useful to draw attention to some of the valuable conclusions which he emphasizes and which a study of his work makes inevitable. In the solution of the somewhat unusual problems of international law which used to come before it, the Arbitral Tribunal did not always enjoy the expert assistance which would have been desirable. According to the rules of procedure, parties were at liberty to appear alone or they could be represented by a German or Polish advocate or teacher of law. This does not seem to have been a happy practice, since the author feels compelled to say (p. 51) that "throughout its activity the Upper Silesian Arbitral Tribunal had relatively very few cases that were really well prepared". On the other hand the author is a strong advocate of direct access of individuals to international tribunals (p. 482):

> "The protection of the population of territories subjected to change of sovereignty is not and cannot be satisfactorily ensured by international organs which only the governments themselves can set in motion. True even in the domain of the diplomatic protection of citizens abroad, this assertion is undeniable in cases of annexation."

It is significant that the Mixed Commission which, as opposed to its President, could only be set in motion by one of the two governments, had little to do, but the author makes it clear that any restriction of the right of recourse to organs of international protection results in an illusion of tranquillity rather than an assurance of justice (p. 482). Another important point is brought out by the discussion of Article 62 of the Geneva Convention which provided as follows: "Les demandes en dommages—intérêts basés sur la violation de droits reconnus et protégées par les dispositions de la présente partie (nationalité et domicile), ne rentrent pas dans la compétence du Tribunal Arbitral." The author's judgment is a warning (pp. 203, 518): "If justice is expected from international decisions, these decisions must include more than condemnation; they must themselves order the reparation. Article 62 was a failure. Let this be a warning against repetition." In this connexion it may be appropriate to draw attention to another remedy which the author found useful and which in fact is probably entitled to wider application: In certain cases a court or administrative authority of either nation could and had to submit the interpretation of an article of the Geneva Convention, if the decision of the case depended thereon, to the Arbitral Tribunal whose judgment was "binding on the tribunals and authorities of both countries". This procedure guarantees, within limits, a uniform practice and is certainly a useful feature which one would wish to meet more frequently. Finally, the author reaffirms the experience which has often been made and of which the Middle East Supply Council and similar war-time institutions are outstanding examples (p. 435): "Technical problems, however complicated, are far more easy to deal with internationally than any question dominated by political psychology".

These few examples drawn at random show the great benefit which may be derived from President Kaeckenbeeck's book. It is written with impressive objectivity and sobriety; the author has succeeded in giving useful inspiration for future settlements. No lawyer theoretically interested in or practically concerned with the problems of the partition of territories will be able to disregard the lessons of this treatise. F. A. MANN.

The Legal Status of the Negro. By Charles S. Mangum. Chapel Hill: The University of North Carolina Press. 1940. 436 pp. $5.

The subject of this absorbing book has little to do with international law except indirectly as a reminder of the difficulties inherent in the notion and in the schemes of an international protection of the rights of man. One of these difficulties, which the book brings out with great clarity, is the insufficiency of the law, however rigidly conceived and administered, to overcome the determined evasions on the part of social prejudice. The other is the baffling delicacy and complexity of any international measures of judicial review and enforcement of national legislation and jurisprudence on a subject of this description—especially in relation to a Federal State of distinctly heterogeneous composition. The book, which is both informative and analytical, contains chapters on the law of libel and slander in relation to the Negroes, on their civil rights, on segregation and discrimination in education, on restrictions with regard to property rights, on involuntary servitude, on segregation in the use of means of locomotion (the Jim Crow Laws), on the position with regard to marriage laws, on mob violence and lynching, on race discrimination in the selection of juries and race prejudice of jurors, and, in particular, on the voting franchise. With regard to the latter, it is difficult to conceive of a branch of the law in which human ingenuity has been more adroitly employed in evading the intention of the legislature. Yet the book shows conclusively the power of determined legal regulation to curb—though not to eradicate —one of the most elemental manifestations of prejudice.

The Armistices of 1918. By Sir Frederic Maurice. Issued under the auspices of the Royal Institute of International Affairs. Oxford University Press. 1943. 104 pp. (7*s*. 6*d*.)

Since the appearance of the *History of the Peace Conference of Paris*, published in 1920 by the Royal Institute of International Affairs, much material in the form of memoirs and otherwise has come to light in the countries of the Allied States on the history of the Armistices of 1918. Sir Frederic Maurice gives a detailed survey of the negotiations preceding the Armistice of November 11, 1918, and of the problems, like sending of provisions to Europe, accompanying its conclusion. There are interesting chapters on the interval between the Armistice and the peace treaties and on the various conclusions to be drawn from the history of the Armistice. Not the least valuable is his account (on p. 55) of the way in which the German High Command contrived, by means which the author describes as fraudulent, to shift the responsibility for the surrender upon the German political authorities and to give colour to the subsequent contention that the German armies had not been defeated in the field.

The monograph concludes with an Appendix giving the texts of the armistices.

Lessons of Allied Co-operation. By Sir Frederic Maurice. Issued under the auspices of the Royal Institute of International Affairs. 1942. 195 pp. (10*s*. 6*d*.)

As the author points out in the Preface, this careful and scholarly study is not of purely historical interest. Neither is the application of its lessons limited to the actual conduct of the war. Co-operation in military matters during the war and the machinery established for that purpose offer, in the author's view, much instruction for the purposes of any international machinery that may be set up for enforcing peace by collective action. One of the conclusions of the book is that while co-operation between armies is difficult of achievement, the easiest form of military co-operation is that of air forces. The author gives a detailed picture of the co-ordination of the military effort in France and Belgium in the years 1914–16, in Gallipoli and Salonika, as well as in the field of naval co-operation. In Part II he traces the attempts at unity of command. In Part III he describes the establishment and the working of the Supreme War Council.

Legal Effects of War. By Sir Arnold Duncan McNair. Second Edition. Cambridge: At the University Press. xx+416 pp. (25*s*.)

The subject-matter of this treatise lies in many respects on the border line of international and English law, and it is therefore fortunate that it should have been written by one who is a master of both. There is no other international lawyer who could have discussed the question of frustration of contract as the result of and in connexion with war with anything approaching Dr. McNair's authority; and there is no other common lawyer who could have brought so much learning and boldness of approach to bear upon the effects of belligerent occupation. The work is concerned primarily with the effects of war in English law, but the subject is treated on a comparative basis and there are numerous references throughout to decisions of foreign tribunals, in particular those of the United States. In this connexion the reviewer, for reasons of his own, has noted with special satisfaction the excellent use to which the author has put the accumulated wealth of the material collected in the nine volumes of the *Annual Digest and Reports of International Law Cases*. But this is a satisfaction in which Sir Arnold is fully entitled to share, for he was the originator of the *Annual Digest* and the joint-editor of its first two volumes.

The treatise begins, by way of introduction, with a discussion of two widely separated questions—both of which are directly relevant to most of the topics dealt with in the chapters which follow. The first chapter is entitled "What is War"?, and analyses the technical meaning of war. The second deals with British nationality and alien status; it includes an informative section on the German law of nationality. The third chapter is devoted to the procedural status of alien enemies. The range and method of treatment may well be illustrated by an enumeration of the headings of the section devoted to the position of the alien enemy as plaintiff. They are: (*a*) the legal character of the plea; (*b*) in action pending at the outbreak of the war; (*c*) co-plaintiff; (*d*) suing in representative capacity; (*e*) non-enemy suing on behalf of enemy; (*f*) enemy in foreign non-enemy territory; (*g*) non-enemy in enemy territory; (*h*) non-enemy in enemy-occupied territory; (*i*) enemy prisoners of war, and enemies interned in British territory or repatriated; (*j*) enemy by reason of identification with the enemy; (*k*) corporations; (*l*) in interpleader issue; (*m*) in Prize Court proceedings; (*n*) statutory enemy. Chapter IV gives an account of the effect of war on contracts (other than frustrations, which is dealt with in Chapter VI). In Chapter V the author treats of the civil status of enemies in the matter of torts; holding, acquisition and disposition of property *inter vivos*; wills and intestacy; and domestic relations. There follows a detailed exposition of the law relating to trading with the enemy. A substantial part of the work (pp. 192–318) is devoted to the effect of war on various categories of contract: affreightment; agency; bills of exchange and promissory notes; companies; employment and guarantee; insurance of property; life insurance; partnership; sale of goods; and solicitor's retainer.

From the point of view of the international lawyer the most interesting and valuable part of the treatise is that devoted to the effects of belligerent occupation of territory, in which the author considers the effect both of acts of an enemy government in an international war and of a revolutionary government in a civil war. A separate chapter is concerned with the novel question of the effects of acts of wholly or partly dispossessed governments. The book ends with a discussion of the effect of peace treaties upon private rights and with an Appendix giving an historical survey of the procedural status of alien enemies.

Sir Arnold's treatise is the product both of a scholar and of a practical lawyer, written to a large extent with an eye on the needs of the practitioner and of courts—a need the urgency of which will increase as, with the termination of war, courts, national and international, are confronted with the liquidation of the numerous legal problems created by the war and by the peace settlement. But this book is much more than an exposition of existing case law and legislation. The author is consistently at pains to present the legal rules within the framework of wider legal principle. As his discussion of the decision of Mr. Justice Clauson in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* shows, he does not hesitate to subject judicial pronouncements to restrained but emphatic criticism—though, in that case, the reviewer would prefer to base that criticism not so much on the principles of the law of belligerent occupation as on the circumstance that the *de facto* recognition of the occupation, which distinguishes it from purely belligerent occupation, ought more properly to have been interpreted in the light of the circumstances of the invasion of Ethiopia and of the obligation of non-recognition which was at that time binding upon Great Britain. In the case of *Government of the Republic of Spain* v. *s.s. Arantzazu Mendi*, the author's doubts seem to refer not to the decision but to the exceptional character of the *de facto* recognition given by the Government. The decisions of the Court of Appeal and of the House of Lords in that case were unanimous, and it is not easy to question them. But the total obliteration of the distinction between *de facto* and *de jure* recognition—including the concession of jurisdictional immunity to the *de facto* Government in an action brought against it by the *de jure* Government—cannot be accepted without qualification. It was not accepted by Mr. Justice Bennett in *Haile Selassie* v. *Cable and Wireless Company* (No. 2), and it is a fair inference from the final decision of the Court of Appeal that the eventual recognition *de jure* did entail legal consequences which did not exist at the time of mere *de facto* recognition. For this reason it is difficult to agree fully with Sir Arnold's view that "the distinction [between *de jure* and *de facto* recognition] is mainly, if not entirely, political, and [that] it is not easy to find any distinction between them so far as municipal consequences, that is, the legal effects as applied by English courts, are concerned" (at p. 353).

For anyone who has not seen and studied this book, the title page may be sadly misleading. This is not a second edition in the usual sense. While the first edition was a slender volume of 168 pages, consisting of a loosely knit collection of articles, this is a comprehensive and systematic treatise which, it may be safely predicted, will become a classic.

H. Lauterpacht.

Principles of Private International Law. By Arthur Nussbaum. 1943. Oxford University Press. 280 pp.

Professor Nussbaum was for many years a professor in the University of Berlin, where he taught Private International Law as applied in European continental countries. In 1933, presumably owing to the advent of the Nazi régime, he left Germany and went to the United States, and holds the office of a visiting research professor in Colombia University. In the United States he has studied private international law as applied in the different jurisdictions of that country and now produces this small volume, which deals for the most part with the rules of conflict of laws applicable in the United States; but he also has something to say about English private international law, as well as incorporating short statements about the practice in European continental countries. This work is in no way a full legal treatise where the practitioner would find most of what he wants. Many topics are not dealt with at all and few of them are dealt with fully. Nor is this in any way an elementary book for a student beginning his studies. Only a fairly advanced student would be able to profit by it. It can best be described as a handbook where various topics are discussed with a wealth of reference to decided cases and to literature. Much useful and interesting matter will be found in it as naturally the unusual experience of the author enables him to present some matters in a different light from that in which a pure common lawyer or a pure continental lawyer would see things.

The author is strongly opposed to the very theoretical and doctrinal discussion of the subject which is more frequent on the Continent than in common law countries, where lawyers arrive at their conclusions by deductive reasoning undeterred by a strong current of jurisprudence contrary to their views. He says:

> "The strong trend towards conceptualism is inherent in any legal matter of a more technical character. In private international law it has become associated with a highly speculative movement. . . . This speculative school obtained complete domination over continental learning, with the conceptualistic component in the ascendant. Recently this school of thought has won a strong foothold in the United States, and it is gaining ground in England. In the light of the common law its unrealistic features have become even more visible."

In this frame of mind, he is, throughout this book, a strong critic of the "Restatement of the law of conflict of laws" produced by the American Law Institute and influenced so powerfully by Professor Beale. Every general theory about private international law is objected to by the author. The vested rights theory adopted *inter alia* by Dicey and the territorial theory of Professor Beale come under equal castigation. Amongst English writers Cheshire seems to find most favour, and Dicey seems to be regarded as a necessary and useful but not altogether sound book. The author notes that the *British Year Book* contains a considerable amount of matter on private international law. A purely practical English lawyer may think that in Professor Nussbaum he has found a man entirely after his own heart when he reads passages like the following on the "qualification problem":

> "Under these circumstances one does not see why the reasoned theory of the court should be abandoned. At least, one should prefer the old rule with its known evils over the new rule with its unknown virtues. Indeed, it has not been considerations of a practical nature which have given rise to the issue of 'qualification' . . . fortunately courts have taken little cognisance of the new, over-refined theories",

but if he reads the work through he may find that his original impression was somewhat mistaken. Professor Nussbaum retains many of the methods of treatment and manner of writing of the continental lawyer and parts of this work are by no means easy reading. There is, however, a very great deal of useful and illuminating matter. He explains the part played by the Supreme Court of the United States in the development of private international law. Contrary to most writers he not only notes, but rather approves, the tendency of courts to apply the law of the forum where any reasonable excuse for so doing presents itself. He notes rather acutely that, whereas continental courts openly base many decisions on public policy, common law courts avoid public policy as far as they can, but frequently manage to produce the same result by convenient but possibly doubtful interpretations of the foreign law which they are applying. While in general rather more well-disposed towards the common law of his adoption than to the continental law of his origin, the author prefers continental methods relating to the proof of foreign law (official government statements or written consultations of experts) to the common law method (oral evidence and cross examination of expert witnesses). His criticisms of the difficulties experienced in finding suitable experts to attend the trial in person, and the almost insuperable difficulties involved when a witness in the box has not merely to translate what he has to say into a tongue which is not his own, but also to express in the legal ideas and terminology of one system, the principles of another system, are very forceful. He may, however, not be aware of the extent to which in fact English cases involving foreign law are in fact decided upon written evidence by the agreement of the parties or the consent of the judge.

E.

The Panama Canal in Peace and War. By Professor Norman J. Padelford. New York: The Macmillan Coy. 1943. xii+327 pp. ($3.)

Professor Padelford has already acquired an eviable reputation as an expert on the Panama Canal, as his articles in the *American Journal of International Law* amply show, and he therefore writes with authority on a subject which he now brings up to date. Much of his material has been brought together with the co-operation of the United States Government and is published in book form for the first time under the auspices of the Bureau of International Research of Harvard University and Radcliffe College.

The construction and operation of this "Inter-oceanic Canal across the Isthmus of Panama" was only rendered possible through the conclusion by the United States of a series of conventions, chief among which are the Hay-Pauncefote Treaty of 1901 with Great Britain, and the 1903 and 1936 Conventions with Panama. The first treaty contained an important article providing that "the Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality". This article, although binding only as between the contracting Powers, has, in practice, been extended by the United States to the vessels belonging to all maritime nations. The Canal has thus become a vital medium of transit for a considerable portion of the world's shipping in time of peace, and has justified the hopes of its promoters who, for more than a century, have looked forward to the building of an international maritime highway through the lands of the American continent divided by the waters of the Pacific and Atlantic oceans. In time of war, the canal has also proved of vital importance for the security of the American hemisphere. At the same time, its neutralization, on the model of the Constantinople Convention of 1888 for the Suez Canal, has proved no bar to the taking of the necessary protective measures by the United States Government. In view of the rapid development of aerial warfare, the military provisions for safeguarding both the Canal and American property within the Canal zone may be held to be as fully applicable to enemy aircraft as they have already been applied to enemy vessels during the first and second Great Wars.

All these various problems are competently and clearly examined by the learned author, who has not confined himself to the exposition of the vast body of legal rules and regulations governing the maintenance and protection of the Canal, but also deals in detail with all the administrative, financial and economic aspects of an enterprise of which the United States is justly proud.

C. J. C.

Proceedings of the American Society of International Law. Thirty-Seventh Annual Meeting. Washington. 1943. 187 pp.

The proceedings of the American Society of International Law are to a large extent a report of a happy domestic occasion. This accounts for the spirit of friendly accommodation which almost invariably characterizes the discussions. These are as a rule of more than passing interest, and the same applies to the papers which precede them. Thus in the present volume we find valuable contributions by General Wickersham on the Government of Occupied Territory, by Professor Hyde on the Punishment of War Criminals, and by Mr. Bullington on the Treatment of Private Property of Aliens in Belligerent Territory. The latter paper, in particular, led to an interesting discussion in which the view of the lecturer that international law prohibits the confiscation of private enemy property was subjected to some criticism.

Characterization in the Conflict of Laws. By A. H. Robertson, B.C.L., S.J.D. Harvard Studies in the Conflict of Laws, vol. 4. Harvard University Press, Cambridge, Mass. 1940. xxix +301 pp. ($3.50.)

Characterization, or, as it is frequently referred to, classification or qualification, shares with *renvoi* the honour of being the *quaestio damnata* of private international law. The student who wishes to obtain a complete picture of the problem must consult about twenty articles, scattered in various legal periodicals and written in a number of foreign languages. Moreover, during the last ten years the problem has increasingly attracted the attention of English, Canadian and American writers whose contributions have enlarged many of its aspects. Yet comprehensive studies on the subject are rare. Lorenzen's excellent survey is largely out of date, while Maury's detailed account neglects the Anglo-American school and Anglo-American practice. This gap has now been filled by Dr. Robertson's book. It falls into four parts. In the first part, questions of terminology are discussed. This is followed by a survey of the methods of solution suggested by other writers. The third part consists of an independent analysis of the problem, while the fourth is devoted to a study of case law. This arrangement entails a certain amount of overlapping, but whatever disadvantage may arise from repetition is offset by a corresponding increase of emphasis and elaboration of the author's point of view.

The survey of previous literature is restricted, with the exception of Bartin, to Anglo-American writers, a limitation which, although perhaps necessary, is to be regretted. Kahn's acute observations are still of interest to-day and Rabel's brilliant essay deserves greater attention than it has been accorded hitherto—to mention only some of the past and present writers on the subject. A discussion of Wolff's doctrine might also have been useful.

The core of the book is to be found in the third part, which consists of the author's analysis of the problem of characterization. Following a trend at present prevailing among Anglo-American writers, he holds that the question of characterization arises during one of three stages which occur in the selection of the law applicable, i.e. (1) characterization of the question or factual situation (primary characterization, e.g., succession, movables, contract, tort, matrimonial property); (2) selection of the proper law by means of selection of the appropriate connecting factor (e.g., domicile, situs, place of contracting); and (3) delimitation and application of the proper law (secondary characterization, e.g., substance or procedure; capacity or formality).

With regard to primary characterization, the author adheres to the prevailing doctrine to the effect that the *lex fori* must decide how its rules of private international law are to be interpreted. Yet, unlike the strict adherents of the *lex fori*, he recognizes that the categories of the internal law of the forum are too narrow and that each system of private international law must work out its own categories independently. It would appear that this doctrine comes near to that put forward by Beckett and Rabel, which the author rejects, apparently under the impression that characterization on the basis of comparative law and analytical jurisprudence presupposes, of necessity, a universalistic system of private international law—which, in truth, it need not. But the author admits two exceptions. In the first place, he holds that immovables and movables should be characterized according to the *lex situs*. The reviewer agrees, as far as immovables are concerned, but on different grounds. Whenever foreign immovables are concerned, the question of jurisdiction is involved. If the *lex situs* regards the object as an immovable, the jurisdiction of the forum is ousted. But whether the object is an immovable for the purpose of establishing the jurisdiction of a foreign court can only be decided in accordance with foreign law, to the exclusion of the *lex fori*. This solution may be compared with the well-known rule that foreign nationality can only be ascertained in accordance with the law of the country the nationality of which is claimed. Since exclusive foreign jurisdiction is not, as a rule, involved in cases concerning foreign movables, the reason for applying the *lex situs* (provided this is possible: see Kahn, *Abhandlungen zum Internationalen Privatrecht*, I, pp. 69 ff.) is not quite clear. Perhaps regard for the principle of effectiveness may be urged, but characterization according to the *lex situs* is not identical with the application of the *lex situs* or of its private international law, and no great advance towards effectiveness is thus achieved. The same must be said with regard to the author's second exception to the effect that characterization in accordance with the *lex fori* is excluded "where [this] characterization will lead . . . to one of two ascertained systems of law, and those two systems agree in adopting a characterization different from [the *lex fori*'s] own".

With regard to the characterization of the connecting factor, Dr. Robertson follows the dominant view which applies the *lex fori*. It is submitted, however, that this solution is not only desirable on grounds of practical convenience, as the author believes, but also the only one acceptable on principle. Dr. Robertson's reference to the test of nationality, so frequently employed on the continent, which must necessarily rely on the law of the country the nationality of which is in question, to the exclusion of the *lex fori*, may be countered by a reference to the solution in the case of double nationality or statelessness (see Kahn, I, pp. 48 ff.). Moreover, even where the common law test of domicile is used, it may be necessary to ascertain, as a preliminary question, when the domicile of a married woman or of a child is to be ascertained, whether the marriage was validly concluded or whether the child is legitimate.

Under the heading of secondary characterization, Dr. Robertson, elaborating a view set out by Falconbridge, proposes a special solution for ascertaining whether a question must be characterized as relating to form or capacity, to substance or to procedure. Thus, for instance, "so much of the [*lex causae*] as the [*lex causae*] says is substantive should be applied . . . so much of the law of the forum as it considers procedural should similarly be applied". In other words, a cumulation of the characterizations employed by the *lex fori* and the *lex causae* is advocated. This view leads, in effect, to the conclusion reached by the German Supreme Court in 1882, where it was held that no statute of limitation could run in an action brought in Germany upon a contract governed by the law of New York seeing that prescription was characterized as substantive by the *lex fori*, i.e. German law, and as procedural by the *lex causae*, i.e. the law of New York. Since Dr. Robertson rejects this solution and approves the later decision of the same court which characterized prescription on the basis of the *lex fori* and applied the law of New York (Robertson, pp. 252–3, 256–7), it is difficult to reconcile Dr. Robertson's general statement with his treatment of the cases. Moreover, there seems to be no reason why a cumulation of charaterizations should be admitted in cases involving substance and procedure or capacity and form, while the same cumulation is (rightly) rejected in respect of the stage devoted to the so-called primary characterization (see the cases quoted by Robertson at pp. 188–9 and by Maury, *Académie de Droit International, Recueil des Cours*, 57 (1936), at p. 486). The usual argument that to disregard the characterization of the *lex causae* in cases involving secondary characterization would lead to the application of rules which are neither those of the *lex causae* nor of the *lex fori* (an argument which could be applied equally to cases of primary characterization) shows a leaning towards a universalistic approach to private international law which can only be met on the basis of principle. Here it must suffice to state, first, that a particular system of foreign law is only the *lex causae* because the private international law of the forum has designated it and, second, that the existence of different categories in the private international law of the forum, coupled with various connecting factors, resulting in a considerable number of conflict rules, may lead to the application of different systems of law to the various phases of a particular factual situation. This is the reason why cases involving a foreign element are not and cannot be decided on lines similar to those followed in cases involving the application of internal law alone, and why a certain *dépéçage* is unavoidable.

These shortcomings, if shortcomings they be, cannot be remedied by the elaboration of technical rules of characterization. They could be avoided if certain *a priori* principles of private international law, such as those put forward by Frankenstein or Meriggi, were to be accepted. This, however, is unlikely. On the other hand, it is not impossible to remedy some defects. Thus, for instance, a provision to the effect that formalities are to be governed by the *lex loci actus*, but that compliance with the formalities required by the *lex causae* is sufficient, would remove some difficulties in the field of the so-called secondary characterization. But as long as the theoretical foundations of private international law have not been worked out in greater detail, as long as students of private international law express at one time a leaning towards the *lex fori* and at another moment towards the natural situs of a legal relationship, or the personal or territorial character of municipal law (see Robertson, p. 229), it is impossible, quite apart from reaching any measure of common agreement, to ascertain what are differences or difficulties in matters of principle and what are merely technical obstacles. Dr. Robertson's book is a valuable contribution towards this end on account of its exhaustive survey of the Anglo-American practice, its detailed analysis of the theoretical aspects and its lucidity of exposition. It has been said that the study of characterization in private international law is "*le privilège des esprits les plus éclairés*". Dr. Robertson occupies a high place in this august circle.

K. LIPSTEIN.

Were the Minorities Treaties a Failure? By Jacob Robinson, Oscar Karbach, Max Laserson, Nehemiah Robinson, and Max Vichniac. Institute of Jewish Affairs. New York. 349 pp. ($2.)

This is an authoritative contribution to the problem of national minorities by writers who have in the past studied and written on the subject. Its usefulness lies both in the critical investigation of the working of the system of protection of minorities as adopted subsequent to the first World War and in the conclusions arrived at by the authors. They give a valuable historical account of the origin of the minorities treaties, of their drafting of their place in the political system established by the Treaty of Versailles, and of their eventual breakdown. Part II of the book contains an analysis of the minorities treaties and of their working within the framework of the League of Nations. There follows a critical and remarkably objective account of the attitude of the States bound by the minorities provisions and of their courts. The chapter on the incorporation of the minorities provisions in the municipal law of the countries concerned fills a serious gap in the literature on the subject.

The conclusions of the authors are instructive and worthy of serious study. They are not inclined to agree that the partial failure of the system of the protection of minorities was due to its inherent weakness. They show with much cogency that the failure was due to the general breakdown of the political system of which the minorities treaties formed an integral and indispensable part. There will be agreement with their view that the system was beneficent to a large extent and that it ought not to be abandoned unless in substitution for arrangements holding out a prospect of equal or greater effectiveness. It is doubtful whether these include schemes for making the protection of minorities universal—unless universality is expressed in an International Bill of the Rights of Man which is more than a mere declaration of principle and which contains specific provisions for the international supervision and enforcement of its clauses. The Research Department of the Institute of Jewish Affairs and the authors of the present study must be congratulated on placing before the student and the statesman a balanced work of undoubted usefulness on one of the central issues of future international organization.

H. L.

The Effect of War on Contract. By P. H. Thorold Rogers, B.A., B.C.L. London: Sweet & Maxwell Ltd. Toronto: The Carswell Co. Ltd. Australia: The Law Book Co. of Australasia, Pty., Limited. 1940. viii+171 pp.

This book has the same excellence as the larger work on the emergency legislation which is known to the legal profession as "Krusin and Rogers". It is a careful, critical, and readable treatment of the incidental effects of war on contract, and also of its direct effect by way of the prohibition of trading with the enemy. As might be expected, the book is not a mere recapitulation of the common law, but gives full prominence to the many statutory changes brought about by the war legislation up to July 1, 1940.

Perhaps the part of the book that is of greatest interest to international lawyers is that concerning enemy character. In the course of his discussion (pp. 132–4) the author challenges the usual statement that an enemy national resident in England has procedural capacity only if he is here with the express or implied licence of the Crown. In the author's view the law has undergone a change, and the law now is that any person resident in England and not trading in or from enemy territory has procedural capacity, for the simple reason that, being on the right side of the line of war, he is not an "alien enemy" for this purpose. There seems to be recent authority to support this view in certain dicta in *Sovfracht (V/O)* v. *Van Udens Scheepvaart* [1943], A.C. at 211 (proposition 2), 219. If Mr. Rogers is right, and it is submitted that he is, English lawyers would be well advised to drop the misleading term "alien enemy" in connextion with procedural capacity, as they have dropped it in connexion with prize law and the law of trading with the enemy, and speak simply of "enemy".

G. L. W.

Repertoire des Questions de Droit International Général posées devant La Société des Nations, 1920–40. By Walter Schiffer. Geneva Research Centre. 1942. 390 pp.

This *répertoire* of questions of general international law which came before the League of Nations in the years 1920–40 is an invaluable work of reference. It is not a mere index. To a large extent it is a digest which enables the reader to form an idea of the nature of the legal rule propounded or accepted. The work covers not only the proceedings of the Assembly and of the Council and of their committees, but also of the special and technical commissions. The classification is altogether admirable and the references are easy to follow. The Index and the main headings are both in English and French. The *repertoire* is the product of prodigious and conscientious effort and both De. Schiffer and the Geneva Research Centre deserve the thanks of the students and of the practitioner for this indispensable instrument of work. It is to be hoped that as soon as circumstances permit an English translation may be available.

International Law and Totalitarian Lawlessness. By Georg Schwarzenberger. London: Jonathan Cape. 1943. 168 pp. (10*s*. 6*d*.)

As the title indicates, this interesting book deals learnedly with a weighty matter from a topical angle. The first chapter, entitled "International Law as a Weapon of Pre-Belligerent Warfare", gives an account of the attempts of German writers to formulate a conception of international law and of international relations suitable to the political needs and the ideology of the third Reich. The main burden of the second chapter entitled "Neutrality and Totalitarian Aggression" is the argument that the General Treaty for the Renunciation of War has modified the obligations of neutrality in relation to the aggressor State and that the historic Lend-Lease Act must be judged from this point of view. The chapter on "Retribution for War Crimes" is a useful contribution to the subject. In the final essay on "The Totalitarian States as the International Outlaws", the author suggests, among other measures, withdrawal of recognition as an expression of the condemnation of the Nazi State by the civilized world. He is probably right in arguing that recognition can be withdrawn, but there will be many who will doubt whether it can properly be withdrawn by way of punishment and whether there are no more effective methods of suppressing lawlessness. The book concludes with some useful Appendices on the subject of war crimes, such as reports of the principal cases decided by the German Supreme Court in 1921 during the proceedings against members of German armed forces accused of war crimes. H. L.

The Italian Conception of International Law. By Angelo Piero Sereni. New York: Columbia University Press. 1943. xii+402 pp. ($5.50.)

This is a book of great merit. The author has set himself the task of following up the development of international law in Italy from the early Middle Ages until the present time. Treaties, the contemporary literature and, as far as modern times are concerned, the decisions of the courts are woven into a pattern which gives a full account of the historical development and the philosophical trends during that period.

The first part, which deals with the development of international law in Italy as evidenced by the treaties concluded among the Italian city states or with foreign sovereigns, and with the writings of the post-glossators, is perhaps the most interesting portion of the book. The author has succeeded in showing that, far from being a product of the seventeenth century and of the centuries which followed it, international law was a flourishing branch of law from the thirteenth century onwards. It was called upon to solve such diverse problems as boundary disputes, exemption from customs duties, communications, international rivers, extradition, legations, territorial waters, maritime intercourse and territorial waters, mediation, war and neutrality, as well as questions of private international law, such as recognition of foreign laws and judgments, contracts and wills. The book fully confirms the belief that the writings of the post-glossators would prove an invaluable source for the student who wishes to investigate the early history of the present doctrines of international law. It is understandable that in a book which has set itself the ambitious task of surveying the history of international law in Italy in the course of eight centuries the work of the post-glossators could only be studied in outline. Thus, for instance, the somewhat peremptory statement that the attitude of Italian writers in the thirteenth and fourteenth centuries towards reprisals was one of contempt and hostility may be met by a reference to the subtle treatment of the problem by Salycetus (1363?) in his lecture in the Authenticum "*Sed omnino*" in C. IV *Ne uxor pro marito*, par. 2 (fol. 115), where he said:

> "*Distinguunt communiter Doctores, aut post neglectam justitiam per dominum, populum vel gentem illius loci potest haberi recursus ad superiorem, et tunc sunt prohibitae represaliae; aut non potest haberi, quia superiorem non recognoscunt de jure* (e.g. the Turks, Saracens) *vel de facto* (King of France, King of England), *et tunc sunt permissae, scil. quia judex illius debitoris, vel dominus vel populus requisitus neglexerit justitiam ministrare.*

A similar view was expressed by Albericus de Rosciate (1340), *ibid.* (fol. 181 vo.):

> "*An aliquo casu sint licitae ipsae represaliae? Dic quod sit, scil. quando dominus requisitus vel magistratus denegat justitiam facere vel negligit conquerenti, quia tunc licite potest civitas eius, cui non fit iustitia, etiam movere bellum illi domino vel civitati.*"

It is interesting to note, moreover, that the passages on reprisals quoted here contain direct allusions to what, in modern law, would be termed the doctrine of denial of justice.

The second part, which deals with the development of international law in Italy in the seventeenth and eighteenth centuries, is mainly based on treaties and thus lends support to the opinion of those writers who believe that the contribution of this period to international law was preponderantly in the field of agreements entered into by sovereign states, a preponderance which, in due course, contributed to a great extent to the success of the modern positivist doctrine. Among the municipal laws discussed by the author the neutrality legislation of 1778–9 is particularly noteworthy. At the same time Galiani, Lampredi and Azuni, who wrote standard works on neutrality and maritime law, are given their due place.

As regards the nineteenth century, the author has admirably succeeded in mastering and presenting the vast amount of contemporary literature, much of which must hitherto have remained unknown to students outside Italy, who are less familiar with the doctrine of nationalities, which was the outstanding contribution of the Risorgimento to international law. Next follows a chapter on the modern positivist school as represented by Anzilotti, Cavaglieri and Perassi. The principal tenets of this school are studied in detail, but the author has been careful to give a balanced survey which also takes into account the somewhat divergent views of the less rigid adherents of positivism, such as Romano and Balladore Pallieri. This chapter, which is a little textbook in itself, may be regarded not only as the best survey of the Italian doctrine of international law published in English. Probably it will find few rivals in Italy who could compete with it as regards both lucidity and comprehensiveness. In the last two chapters the author studies the international status of the Kingdom of Italy and of its colonies, the Italian practice in matters of international relations, the system of treaties concluded by Italy, municipal legislation relating to international law, and the practice of the courts. Like the preceding chapters, these sections are accurate, exhaustive and up to date. The decision of the United Sections of the Court of Cassation in the case of *De Meeus* v. *Forzano*, dated January 18, 1940, *Foro Italiano*, 1940, I, 336, which reversed the previous constant practice and granted immunity to diplomats both in respect of acts of a public and of a private law nature, is not taken into account when this question is first discussed (p. 324), but it would appear that it has been incorporated in another paragraph (p. 332 and note 35). The question whether foreign diplomatic agents of Italian nationality accredited to the Italian Government must be granted immunity is left open by the author (p. 332), but it has since been answered in the negative by the Central Commission for Direct Taxes in *The case of the Marchese di Sorbello*, decided on March 26, 1941, *Foro Italiano*, 1941, III, 176. An excellent bibliography is contained in an appendix.

The author concludes that "the Italian school has developed a vigorous body of doctrine, and familiarity with it is useful to any student of international law. Its qualities should be combined with the great virtues of American international lawyers: realistic approach to the problems considered; thorough review of the diplomatic practice of the states and of all the relevant cases; full understanding of the exigencies of the practice". The author has accomplished this task, and he has accomplished it well.

K. LIPSTEIN.

The Atlantic Charter. By Julius Stone. Sydney and London: Angus & Robertson. 1943. 245 pp.

This is a collection of essays, only two of which are devoted to an analysis of the provisions of the Atlantic Charter. The others are concerned either with questions of post-war international organization or, like the essays on Law in the Modern State and on the Rise and Fall of the Nation-State, with more general problems. Professor Stone, who is both a common lawyer and a writer on international law and relations, regards the Atlantic Charter as a legal instrument which permits and demands an exacting juridical interpretation. He analyses its clauses and individual expressions with learning and acumen.

The Atlantic Charter may not be a contractual instrument laying down legal rights and obligations of the parties. But Professor Stone rightly declines to treat it as a mere act of war strategy. His two chapters are probably the most illuminating gloss that has as yet appeared on that significant document. This applies in particular to that aspect of the Charter which bears on the position of dependent peoples and regions.

International Agreements on Conservation of Marine Resources. By Jozo Tomasevich. Food Research Institute, Stanford University, California. 1943. xi+297 pp. ($3.)

This volume inaugurates a new series on "Commodity policy studies", the main object of which is to inquire into the various problems and achievements of representative food agreements in the past and their more effective realization in the post-war period. As one of the most important marine wealths in the world, the fishing industry urgently demands an international regulation if it is to produce the maximum results in future.

Dr. Tomasevich is well qualified to write this book, especially from the technical and financial point of view, as he formerly acted as an economist to the National Bank of Yugoslavia. He analyses successively all the international agreements so far entered into for the regulation and preservation of the fur seal industry and the Pacific halibut and sockeye salmon fisheries. On the other hand, his treatment of whales in an appendix is wholly inadequate, as it is disposed of in just over twelve pages.

The work was published too early for an examination of the International Fisheries Conference held in London in October 1943, for the consideration of a draft Convention prepared by the Government of the United Kingdom and intended to replace some of the previous Conventions on fisheries. It is hoped, however, that the learned author will be able to include the results of the final Conference on the subject, and also supplement further his present studies in a second edition of his book.

C. J. C.

The Backbround of Hispanic-American Law. Legal sources and juridical literature of Spain. By I. T. Vance. New York: Central Book Company. 1943. viii+ 296 pp. ($6.50.)

Students of the Law of Nations in their quest for "The general principles of law recognized by civilized nations" cannot lose sight of the fact that "those general principles of law are for most practical purposes identical with general principles of private law" (Lauterpacht, *Private Law Sources and Analogies of International Law*, 1927, p. 71). Hence the need for the study of national systems of law and their evolution.

Spanish law forms the background of the legal systems of the twenty republics of Latin America. It has not lost its great influence even after those republics had become independent and begun—each of them to a great extent separately—their own law-creating evolution. But the greatest influence of Spanish law in Latin America is noticeable in the period beginning with the Conquest and ending about the end of the eighteenth century.

With infinite patience and great lucidity Dr. Vance gives a comprehensive survey of the sources of Spanish law, of its historical treatment and of its bibliographical sources. As instructive as the whole book is, one can single out—as especially interesting—the chapters of Arabic Jurisprudence, Maritime Law and the Sources of Regional Law—all containing material not easily accessible to a non-expert. It was not necessary to the author to give a history of Spanish thought in International Law and he only refers to some books on Natural Law and the Law of Nations (pp. 260–2).

In acknowledging the debt of students to Dr. Vance one cannot fail to mention his contributions on the bibliography of Latin-American law in the several issues of the *Handbook of Latin-American Studies*. Those contributions can now be studied in the light which his book throws on the evolution of Spanish law. Dr. Vance's death is a great loss, but the work he has done for the Law Library of the Cong ess and for the study of history of law will be remembered. And those of us who were privileged to meet him will remember his invariable kindness, modesty and learning.

Vladimir Idelson.

The House Committee on Foreign Affairs. By Albert C. F. Westphal. New York: Columbia University Press. London: P. S. King & Staples Ltd. 1942. 268 pp. ($3.)

The part which the Committee on Foreign Affairs of the United States House of Representatives has played in the formulation and in the conduct of the foreign policy of the United States has been obscured by the direct influence and participation which the constitution reserves for the Senate Committee on Foreign Relations. But Dr. Westphal shows, with the help of a detailed study of the archives of the Committee of the House of Representatives, that its part has not been negligible. The members of the House of Representatives, whose tenure of office is more precarious than that of the Senate, are to certain extent in more direct contact with public opinion, and it is possible that their influence in the field of foreign affairs will grow. At a time when the part of the American legislature in shaping the nature of the participation of the United States in any future international organization is bound to be of paramount importance, Dr. Westphal's book is particularly timely. It gives a detailed account of the working of House Committee on Foreign Affairs, of its relations with the State Department and of its function in the treaty-making process. There are interesting chapters on the part which it played in the arms embargo policy of the United States and in the neutrality legislation. Dr. Westphal makes some positive suggestions for the future, including closer contact with the Senate Committee on Foreign Relations and with the various committees of the House of Representatives.

A Guide to American International Law and Practice. As found in the United States Constitution, treaties, statutes, decisions, executive orders, administrative regulations, diplomatic correspondence, and many instructions, including war-time law. By John H. Wigmore. New York. Matthew Bender & Co. 1943. 493 pp.

This book, which is in the nature of an enlarged Index, is intended mainly, if not exclusively, for the use of legal practitioners in the United States. It is written in the form of brief statements of the law or questions accompanied by references to the various sources as indicated in the title and to the literature on international law. The range of the sources on which the learned author has relied is limited, but is probably sufficient for the practising lawyer at the initial stage of his labours. The object of the author, in addition to providing the practitioner with a work of reference, was to impress upon him the fact that international law is a concrete body of rules as distinguished from academic disquisition. There is no doubt that the author has succeeded in this laudable purpose. It may be doubted whether there was sufficient reason for limiting his sources to purely American material. After all, international law is international. Judges in the United States courts have not hesitated to look for guidance or corroboration to the decisions of courts of other countries, especially those of Great Britain.

The Foundations and the Future of International Law. By P. H. Winfield. Cambridge University Press. 1941. 125 pp. (3*s*. 6d.)

This little book, one of a Series on Current Problems, published by the Cambridge University Press under the general editorship of Sir Ernest Barker, fulfils admirably the purpose of the series and of the author. It is addressed to the general reader, but it puts before him not only the principal rules but also many of the current problems of the international law of peace and war. Professor Winfield is a master both of compression and of lucidity, and the book never becomes a mere catalogue. The concluding section, which is devoted to the question of the future of international law, is an eloquent exposition of a progressive and hopeful view of things.

A Study of War. By Quincy Wright. The University of Chicago Press; Cambridge University Press. 1942. 2 volumes. 1552 pp. ($15.)

This is an historical and sociological rather than legal treatment of the problem of war. But the work, which is encyclopaedic in scope, is of profound interest and usefulness for the student of international law. It is in some respects—especially in the matter of the numerous Appendices—the result of co-operative effort, but the work as a whole is the product of Professor Wright's wide scholarship and of prolonged labour extending for over a decade.

The first volume is historical in character. It covers such subjects as the origin of war; animal warfare; primitive warfare; an historical survey of the causes and objects of war; the place of war in relation to the character of modern civilization;

fluctuations in the intensity of modern war; and the functions, the technique and the theory of modern war. The chapters on the contradictions of modern civilization in relation to war and on the changes in war through history are of absorbing interest. The Appendices to this volume cover nearly three hundred pages. They include such subjects as the relation of history to geography, the characteristics of animal warfare, the relation between warlikeness and other characteristics of primitive peoples and military characteristics of historic types of civilization. The Appendices are accompanied by an imposing apparatus of statistical data, graphs, charts and illustrations.

The second volume is of more direct legal interest. It begins with chapters on the technical meaning of war, on the relation of social sciences to war, and on the analysis of its causes. It continues with an exposition of the theory of the balance of power, of the relation of foreign policy and armament, and of the effect of internal conditions of government upon war and foreign policy. There follow chapters on law and violence, on sovereignty and war, and on international procedures for the prevention of war. This part of the volume bears directly upon international law, as do the chapters on the family of nations, on nationalism and war, on social integration and war, and, in particular, on international organization and war. The author then discusses in separate and detailed chapters the psychological causes and aspects of war such as the incidence of public opinion, population changes, utilization of resources, and human nature. There follow chapters on measurement of international relations, the probability of war and, once more, on causes of war. The volume concludes with a discussion of the control of war and with a final chapter entitled "Towards a Warless World". The Appendices to this volume include subjects of great variety such as an analysis of war by economists, scientists, and psychologists, the duel, theories of State responsibility under international law, and the distinction between legal and political disputes.

It is not possible within the scope of a necessarily brief review to attempt a critical estimate of the views presented in what is substantially a treatise on international relations with particular reference to the problem of war. It is a guide through many a problem of political theory and constitutional law. The work will for a long time be an indispensable instrument of work for the student of the subject. It is a scientific production of high value. The University of Chicago must be given due and high credit for sponsoring an undertaking of this magnitude. Professor Wright is entitled to view with satisfaction the completion of a stupendous effort extending over many years and brought to fruition in circumstances of exceptional difficulty.

H. LAUTERPACHT.

INDEX

Abodi Mendi, The, 181
Abyssinia, annexation of, implied recognition of, 139, 140
Address, mode of, implied recognition and, 138–40
Agents, appointment of, 136
Ahmed Bey El Saadani v. *El Sayed Mohamed Dessouki* (1935), 46
Air warfare, Hague rules of, 65, 75
——, legitimate objectives in, 158
Aliens Act, Status of (1943), and British nationality, 176
Altman v. *United States* (1912), case of, 116 n.
Alwaki, The, 236
Amadeos, Santos P., *Argentine Constitutional Law*, 234
Amazone, The, 199
Ambrose Light, The, 148 n.
Amgot, functions of, 152, 153
Anglo-German Payments and Transfer Agreements, 17
Annette, The ; The Dora (1919), 136, 141
Annual Digest and Reports of Public International Law Cases, 234
Arantzazu Mendi, The, 180, 182, 183 n., 184, 199
Archives, immunity of, 37, 38
Arrangements, administratifs, 114
Asylum, right of, 87
Atlantic Charter, the, 121
—— ——, the I.L.O. and, 103
A.-G. of Canada v. *A.-G. of Ontario and others* (1937), 112 n.
Auer v. *Costa*, 44 n.
Austria, annexation of, implied recognition of, 144
Austrian Loan Guarantee Act (1933), 20

Baarn, The, 217
Balogh, Elemer, *The Eternal Refugee : Political Refugees in Ancient Greece*, 234–5
Banco de Bilbao v. *Rey*, 183 n., 184
Beaverford, The, 100
Beckett, W. E., Consular Immunities, 34
Belligerency, implied recognition of, 147, 148
Bentwich, Norman, Statelessness through the Peace Treaties, 171
Bilateral treaties, implied recognition and, 127, 128
Blonde, The (1925), 115 n.
Boehme v. *Stross* (1934), 35 n., 46
Brierly, J. L., *The Law of Nations*, 235–6
——, Vital Interests and the Law, 51
British-Czechoslovak Treaty (1940) on extraterritoriality, 62 n.
British nationality, cases concerned with, 218–21
—— ——, and Status of Aliens Act (1943), 176
Brook v. *Brook*, 206
Buvot v. *Barbuit*, 34, 35
Byoir v. *Tsune-Chi Yu* (1940), 44
Campbell v. *Cour des Sessions générales de la Paix* (1915), 42, 50
Canada, the Supreme Court of, 198
Canning, on implied recognition, 130
Carriage of goods by sea, 100, 101
Castro v. *De Uriate* (1883), 43–4
Characterization, cases concerned with, 202, 203
Cherokee Nation v. *Georgia* (1831), 22
Chester v. *Benner*, 43
Christina, The, 199
Chung Chi Cheung v. *The King*, 34 n., 185, 235
Churchill (V. L.) and Co., Ltd. and *Lonburg*, 230 n.
Clarke v. *Cretico*, 35
Classification, problem of, 202, 203
Collisions, 98, 99
Colombos, C. J., *A Treatise on the Law of Prize*, 236
——, The Unification of Maritime International Law in Time of Peace, 96
—— (with A. Pearce Higgins), *The International Law of the Sea*, 241–2
Combined Raw Materials Board, 168
Commonwealth v. *di Silvestro*, 144
Comparative Law and the Law of Nations, 1
Conferences, participation in, 131
Confiscatory legislation, effect of, 184, 185, 186
Conserva, The, 148 n.
Consular Immunities, 34
—— Immunity of Archives, 37
—— —— from Jurisdiction in respect of—
Juridical Basis, 48
Official Functions, 38
Consular Premises (*Greece*) *Case*, 46, 48 n.
Consuls, appointment and reception of, 133
Contract, law of the, 213–16
Contracts, localization of, 18, 19
Cook v. *Sprigg*, 11 n.
Corporations, domiciled in enemy occupied country, status of, 223–7
Crimes against International Public Order, Committee concerned with, 58 n.
Curtis, Monica, ed. *Documents on International Affairs, 1938*, 236
Czechoslovakia, annexation of, implied recognition of, 135

De facto recognition, jurisdictional immunities and, 181, 182
de Massa v. *de Massa*, 204
Debts in foreign currency, 216–18
Decerf's Case, 89 n.
Decisions of the English Courts involving points of public or private international law, 180–221
—— —— relating to trading with the enemy, 222–33
Dickinson v. *Del Solar*, 197
Dillon, Colney Hall, *International Labor Conventions*, 241
Diplomatic immunities, 196–9

Diplomatic representatives, accrediting and receiving of, 131
Dolski, Alexander, *Kształtowanie Elementów Państwa* (*The Formation of Elements of Statehood*), 237
Domicile, the law of, 202–10, 212
Dominions, treaty-making power and, 112 n.
Domké, Martin, *Trading with the Enemy in World War II*, 237
Don Alphonso v. *Banco de Viscaya* (1935), 188 n.
Dover Castle, The, 77
Drago, Dr. Luis, 13 n.
Drewry (*H. F.*) *S.A.R.L.* v. *Onassis*, 226

Eichengruen v. *Mond*, 225 n.
Elliott (W. Y.) and H. Duncan Hall, *The British Commonwealth at War*, 237–8
"Enemy-occupied territory", meaning of, 225
Ertel Bieber & Co. v. *Rio Tinto Co.* (1918), 228 n.
Ex parte Quirin et al (1942), 64, 65
Ex-Rajah of Coorg v. *The East India Co.* (1860), 26
Exequatur, request for and issue of, implied recognition and, 134–6
Extradition, law of, surrender of war criminals and, 86–95

Farnsworth, A., *The Residence and Domicile of Corporations*, 238
Faucompré v. *Polish Consul-General* (1932), 45
Feilchenfeld, E. H., *The International Economic Law of Belligerent Occupation*, 239
Feist v. *Société Belge d'Electricité* (1933), 17 n.
Fibrosa S. A. v. *Fairbairn Lawson Combe Barbour Ltd.* (1943), 7 n., 226
Finch, G. A., *An Analytical Index to the American Journal of International Law and Supplements*, vols. 15 to 34 (1921–40) and the *Proceedings of the American Society of International Law*, 1921–40, 239
Fiscal v. *Samper* (1934), 88 n.
Fisheries, international regulation of, 105, 106
Food Controller v. *Cork*, 25
Foreign Armed Forces, extraterritoriality of, 62 n.
—— currency, debts in, 216–18
Foster v. *Neilson*, 116 n.
Four Packages of Diamonds v. *United States*, 116 n.
France-Chile, Arbitral Tribunal, 10 n.
Frankenstein, E., *Justice for my People*, 239
Freedom of the seas, 96
Fur seals, international protection of, 106

Galene v. *Galene*, 202, 203
Garner, J. W., *Studies in Government and International Law*, 240
"General principles of Law", 4–6, 9, 10
George W. Hopkins' case, 133 n.
Ginsberg v. *Canadian Pacific Steamship Co., Ltd.* (1940), 232 n.
Glenearn, The (1941), 233
Glenroy W.N., The, 227
Gold clauses, 17, 18 n., 21, 23, 28–31
Governments in exile, effect of decrees of, 188–93
Government of Occupied Territory, 151
Government of the Republic of Spain v. *The National Bank of Scotland*, 183
Government of Spain v. *The Chancery Lane Safe Deposit, Ltd.*, 196
Graumann v. *Treibel*, 216
Greenland, agreement between the United States and Denmark, 122
Grotius, *De Jure Belli ac Pacis*, 23
Guardianship of children of foreign nationality domiciled abroad, 204, 205
Gutteridge, H. C., Comparative Law and the Law of Nations, 1

Hague Agreement, 20 Jan. 1930, 16
Hague Convention No. IV, 64 n., 65, 75
—— ——, No. VIII, 78
—— ——, No. X, 77
—— ——, No. XI, 78
Hague Protocol of August 31, 1929, 15, 16
Hague Rules of Air Warfare (1923), Article 24, 65
—— Article 25, 75
Hague Rules, The (1921), on the contract of affreightment, 101
Hahn v. *Public Trustee*, 190
Hall, *International Law*, 79
Hall, H. Duncan, Combined Raw Materials Board, 168–171
Harvard Law School Draft (1932), 36, 47
—— —— ——, Department of Research and League of Nations codification work, 36
—— *Research in International Law*, 36, 47
Heathfield v. *Chilton*, 35
Heimatsrecht, principle of, 171, 172, 173
Henkle v. *London Exchange Insurance Co.*, 222 n.
Henriques, E. F. Q., Decisions of English Courts relating to Trading with the Enemy, 1939–43, 222
Higgins (A. Pearce) and C. John Colombos, *The International Law of the Sea*, 241–2
"High Contracting Party", meaning of, 201, 202
Hirji Mulji v. *Cheong Yue S/s Co.*, 7 n.
Holland, T. E., *The Laws of War on Land*, 62
Holyoke Water Power Co. v. *American Writing Co.*, 23
Hudson, Manley O., *International Legislation: multipartite instruments*, 243–4
—— ——, *World Court Records*, 242
Hume Pipe, etc., Co., Ltd. v. *Moracrete Ltd.*, 221

Immunity of a foreign sovereign from process, 180
Implied recognition, 123–50
—— ——, of belligerency, 147
—— ——, admission to the League of Nations and, 145
—— ——, and the policy or obligation of non-recognition, 141
Imprévision, doctrine of, 6, 7

In re Amand, 188, 190
In re Amper, 89 n.
In re Anglo-International Bank, Ltd., 230
In re Anziani, 215
In re Assaud, 35 n.
In re B's Settlement, 202, 204
In re Banca Commerciale Italiana, 232
In re Cutcliffe's Will Trust, 202, 203
In re de Barbe: Ellissen v. *Griffith*, 233
In re the D. Infants, 202, 205
In re Deutsche Bank, 232
In re Doelitzsch, 89 n.
In re Diogenes Gonzalez, 89 n.
In re Dr. Paulo Deleuze, 91 n.
In re Farbenindustrie Aktiengesellschaft's Agreement, 233
In re Fernando Benet, 89 n.
In re Ferdinand, ex-Tsar of Bulgaria, 223
In re Forster's Settlement: Forster v. *Custodian of Enemy Property for England*, 233
In re Gourju's Will Trusts, 233
In re Grove, 207
In re Hall, 233
In re Hans Fischer, 229 n.
In re a Judgment Debtor, 199, 200, 201
In re Kaphengst, 90 n.
In re Luck, 202, 206, 210
In re McAll's Estate, 116
In re Meunier, 90 n.
In re Missouri S.S. Company, 214
In re Munster, 233
In re Ning Yi-Ching, 194
In re O'Keefe, 211
In re Paine, 202, 205, 210
In re a Reference as to the Powers of the Corporation of Ottawa, 196, 198
In re Richard Eckerman, 90 n.
In re Ross, 211
In re San Pietro, deceased, 229
In re Schiff, 229 n.
In re Tsiaras, 89 n.
In re del Valle Inclán, 38 n.
In re Vilca, 89 n.
In re Viscount Furness, deceased, Wilson v. *Viscount Furness*, 233
In re Vuotich, 50 n.
In re Wright's Trust, 208, 209
Inter-American Committee of Jurists, draft general conventions with regard to consuls, 36, 47
Inter-departmental agreements, 117, 118
Inter-Imperial legislation, rules of the sea and, 97
International Agreements other than "Inter-State Treaties"—Modern Developments, 111
—— Commodity Control Agreements, 249–50
—— Criminal Court, 80–2
—— *Conferences of American States. First Supplement*, 1933–40, 246
—— Convention on Financial Assistance, Geneva (1930), 32
—— Institute of Rome, draft international code of the law of sale, 6
—— *Labour Code*, 1939, 246–9
—— Labour Conference, and International Labour Code, 246–9
International Labour Conference, and the League of Nations, 120
—— Labour Office, publications by, 246–50
—— Labour Organization and maritime legislation, 103
—— Law Association, 100
—— —— Hague Rules, 101
—— Law, Institute of, draft general conventions with regard to consuls, 36, 47
—— —— ——, Resolutions on the Recognition of New States, 149 n.
—— Maritime Committee, 98
—— —— Conferences, 99–102
—— Public Order, Committee concerned with Crimes against, 58
—— Settlements, Bank for, 16
—— *Trustee for the Protection of Bondholders A.G.* v. *The King*, 13 n., 15, 15 n.
Irish Free State, citizens of, liability to military service in Great Britain, 219–21
Isaacs v. *Barclays Bank and another*, 232 n.

Johnson v. *Briggs* (1939), 144
Jones, J. Mervyn, International Agreements other than "Inter-State Treaties", 111
Jones v. *Walker*, 116 n.
Jupiter, The, 184, 185, 190

Kaeckenbeeck, Georges, *The International Experiment of Upper Silesia*, 250–2
Keighley v. *Bell*, 72
Keith, A. Berriedale, *Wheaton's International Law*, 242–3
Kellogg Pact, reasons of failure of, 56
Kelsen, H., on Kellogg Pact, 56
Kessler v. *Best*, 38
Khangi v. *Guthman*, 45
Konstamm (R. & A.) v. *Ludwig Krumm (London) Ltd.*, 228 n., 229
Kotia v. *Nohas*, 211

Lalezar v. *H. B. M. Consul at Kermanshah*, 46
Landley v. *Republic of Panama*, 44 n.
Lauterpacht, H., *The Function of Law in the International Community*, 7, 8
——, The Law of Nations and the Punishment of War Crimes, 58
——, *Private Law Sources and Analogies of International Law*, 2, 3, 6, 10, 11, 22, 23, 24 n.
Law of Nations and the Punishment of War Crimes, 58
Lazard v. *Midland Bank*, 188 n.
League of Nations, admission to, implied recognition and, 145, 146
—— —— Council, liabilities between governments, 32
—— —— Covenant of the, Article 14, 20
—— —— ——, Article 17, 130
—— —— ——, Article 23, 102
—— ——, a draft international code of the law of sale, 6
—— —— and loans, 15, 20
—— —— Preparatory Codification Committee (1927), 36, 47
Legitimacy, determination of, 206, 207
Legitimate Objectives in Air Warfare, 158

Legitimation *per subsequens matrimonium*, 208, 209
Leipzig trials, 70, 84–6
Leonard v. *Premio Real*, 43
Liens, maritime, 101
Little v. *Riccio and Fischer*, 45, 49 n.
Llandovery Castle, The, 65, 73 n., 84
Lorentzen v. *Lydden & Co., Ltd.*, 184, 185, 231
Lotus, The, 63, 88 n., 99
Lousada's case, 205
Lubrafol motor vessel v. *Pamia*, 231
Luccioni v. *Luccioni*, 230
Luther v. *James Sagor & Co.*, 128, 129 n., 189, 192, 193
Lyders v. *Lund*, 43, 48 n.

Maas v. *Seelheim*, 42
Macbeath v. *Haldimand*, 48 n.
McNair, Sir Arnold Duncan, *Legal Effects of War*, 253
Madeline Vionnet & Cie v. *Wills*, 216, 217
Maluquer v. *R.*, 42
Manchukuo, implied recognition of, 128, 143
Mandated Territories, during the second World War, 164–8
Mangum, Charles S., *The Legal Status of the Negro*, 252
Mann, F. A., The Law governing State Contracts, 11–33
Manning, W. R., ed. *Diplomatic Correspondence of the United States*, 244–6
Maritime International Law, Unification of, in Time of Peace, 96–110
—— wealth, international regulation of, 107, 108
Marrache v. *Ashton*, 218
Marriage, nullity of, jurisdiction of courts of domicile, 202, 203
Maurice, Sir Frederic, *The Armistices of* 1918, 252
—— ——, *Lessons of Allied Co-operation*, 253
Mazzucchi v. *American Consulate*, 45, 48 n., 49 n.
Munich agreement (1938), 121
Mette v. *Mette*, 205, 206
Meyer v. *Louis Dreyfus et Cie*, 229 n.
Military courts, competence of, 66
Ministre des finances v. *Héritiers X*, 45
Modus vivendi, 113
Monaco v. *Monaco*, 205
Montesquieu, on the Laws governing international relations, 52
Moodolay v. *Morton and East India Co.*, 26 n.
Morley, Sir J. Headlam, on the concept of vital interests, 52
Mortgages, maritime, 101
Moscow Declaration on Atrocities (1943), 60 n.
Muller case, 84
Multilateral treaties, implied recognition and, 125, 126
Murphy v. *Lee Jortin*, 44
Murray v. *Charleston*, 20 n., 23 n.
Murray v. *Parkes*, 130 n., 218, 219
Musmann v. *Engelke*, 198

Nabob of the Carnatic v. *East India Co.*, 22, 26
Neumann case, 84
Neutral assessors, participation in trials of war criminals, 82
—— States, surrender of war criminals from, 86–95
Noblot case, 90 n.
Non liquet, 2
Non-recognition, obligation of, implied recognition and, 141–4
Nugent's case, 205
Nussbaum, Arthur, *Principles of Private International Law*, 254–6

Occupied Territory, Government of, 151
Ocean Steamship Co., Ltd. v. *Queensland State Wheat Board*, 211, 216
Oetjen v. *Central Leather Co.*, 189
Official functions, consular, immunity from jurisdiction in respect of, 38–48

"Pacta sunt servanda", principle of, 6, 7
Padelford, Professor Norman J., *The Panama Canal in Peace and War*, 256
Palestine, administration during the Second World War, 164, 165
——, position of citizens of, 2, 8, 219
Panama Canal Treaty, 23
Pan-American Convention on Consular Agents (1928), 36, 41
Passengers, at sea, obligatory insurance of, 102
Patch v. *Marshal* (1853), 43
Pavan case, 90 n.
Peace Conference (1919), Commission on Responsibilities, 69, 69 n., 70, 77, 78, 81 n.
—— Treaties after the first World War, Statelessness through the, 171
Permanent Court of International Justice, abuse of rights, 7
—— —— —— —— article 38 of Statute, 2, 5, 9, 11, 19, 21, 88
—— —— —— ——, Free Zones case, 7, 19 n.
—— —— —— ——, and the general principles of law recognized by civilized nations, 2, 5
—— —— —— ——, international loans, 20
—— —— —— ——, right of entering into international engagements, 13
Perry v. *United States*, 13
Personal status, cases concerned with, 202–11
Petersen v. *Lyders*, 43 n.
Phillipson v. *Imperial Airways Ltd.*, 115 n., 199, 210
Political offences, extradition in respect of, 90–2
Pomona, The, 226, 236
Porter v. *Freudenberg*, 226 n.
Princess Paley Olga v. *Weisz*, 189 n., 192, 193
Prinz Knud, The, 233
Prisoners of war, in enemy country, whether alien enemies, 229
Private Law, International Law and, 1–3
Proceedings of the American Society of International Law, 257
Pyrmont v. *Schott*, 217, 218
Raw Materials Board, 168
Renvoi, doctrine of, 210–16
Reprisals, effect of operation of, 75–7

Republica de Guatemala v. *Nunez*, 215
Requisition, by foreign government, effect of, 185–7
Reviews of Books, 234–66
R. v. *Ahlers*, 42
R. v. *Dudley*, 73
R. v. *The Home Secretary, ex-parte Amand*, 231 n.
R. v. *Kent*, 196, 197, 198
R. v. *Kettner*, 218
River navigation, 104
Robertson, A. H., *Characterization in the Conflict of Laws*, 257–9
Robinson (Jacob), and others, *Were the Minority Treaties a Failure?*, 259–60
Rogers, P. H. Thorold, *The Effect of War on Contract*, 260
Roman Law, meaning of, 3, 4
Rudoyevitch, case of, 205
Russian Commercial and Industrial Bank case, 184

Salem v. *Khayat*, 217 n.
Salmon fisheries, international regulation of, 106
Salvage, 99, 100
Schering Ltd. v. *Stockholms Enskildabank*, 228
Schiffer, Walter, *Répertoire des Questions de Droit International Général devant La Société de Nations, 1920–40*, 260–1
Schwarzenberger, Georg, *International Law and Totalitarian Lawlessness*, 261
Secretary of State v. *Bai Rajbai*, 27 n.
Secretary of State v. *Kamachee Boye Sahaba*, 11 n., 26, 27 n.
Secretary of State v. *Sardar Rustam Khan*, 27
Sedgwick Collins case, 184
Serbian and Brazilian Loans, 14 n., 25 n.
Sereni, Angelo Piero, *The Italian Conception of International Law*, 261–3
Shipoff v. *Elte*, 125 n.
Shipowners' liability, limitation of, 100
Sicily, Allied military government of, 155
Simon, Lord Chancellor, on political asylum, 87
Skiriotes v. *State of Florida*, 97
Smith, H. A., on international rivers, 55
——, The Government of Occupied Territory, 151
Sovereignty, territorial and personal, limits of, 188, 189
Sovfracht (*V/O*) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N. V. Gebr.*), 223, 224, 226, 260
Soviet Russia, implied recognition of, 129, 140
Spaight, J. M., Legitimate Objectives in Air Warfare, 158–64
Spain, Government of, as a corporation, 195
Spanish Civil War cases, 180–4
Starling v. *Custodian of Enemy Property*, 233
State Contracts, the law governing, 11–33
State debts, legal character of, 13, 14
State-owned ships, immunities of, 101, 102
Statelessness resulting from new Nationality Laws, 174
—— through the Peace Treaties after the first World War, 171
Status of Aliens Act (1943), British Nationality and, 176
Stockholms Enskildabank v. *Schering Co. Ltd.*, 227
Stone, Julius, *The Atlantic Charter*, 263
Sulaman v. *Secretary of State*, 27 n.
Superior orders, plea of, 69–74
Supreme Court of the United States, criminal liability of individuals for violations of the laws of war, 65
—— —— —— ——, obligation of contract, 20
Surrender of war criminals, legal basis of, 60–6
Sutton v. *Johnstone*, 71 n.
Syria, mandate over, during the World War, 165, 166

Taylor v. *Barclay*, 134 n.
Telkes v. *Hungarian National Museum*, 37 n.
Terlinden v. *Ames*, 116 n.
Territorial principle, punishment of war crimes and, 63
—— waters, three-miles limit, 96, 97
Three-miles limit, 97
Tingley v. *Muller*, 226
Tomasevich, Jozo, *International Agreements on Conservation of Marine Resources*, 263–4
Torni, The, 214, 216
Trading with the enemy, common law doctrine of, 222
—— ——, decisions of the Swedish Courts relating to, 222–33
Trail Smelter Arbitration (*United States* v. *Canada*), 94 n.
Transactions of the Grotius Society, 240
Travaux préparatoires, 9
Treaties, conclusion of, 124
——, definition of, by Harvard Research, 25
——, Harvard Research on the Law of, 25
——, ratification of, effect of, prior to ratification, 202
Trent, The, case of, 136–7
Triquet v. *Bath*, 34
Twycross v. *Dreyfus* (1877), 13 n.

Udney v. *Udney*, 208, 209
Unification of Maritime International Law in Time of Peace, 96–110
United States, Constitution, Articles I and VI, 117
—— ——, Supreme Court of, treaties and, 117
—— ——, Monroe Doctrine and, 53
United States of America (Visiting Forces) Act (1942), on extraterritoriality, 62 n.
United States v. *Belmont*, 114 n.
—— —— v. *Hecht*, 90 n.
—— —— v. *Lanz*, 52 n.
—— —— v. *Tobacco Factory*, 116 n.
—— —— *ex rel. Zdunic* v. *Uhl*, 144 n.
Universal Postal Convention (1934), 23

Vajesingji Joravarsingji v. *Secretary of State*, 27 n.
Valentine v. *United States*, 87 n.
Vance, I. T., *The Background of Hispanic-American Law*, 264

Vandyke v. *Adams*, 229
Vavasseur v. *Krupp*, 49
Versailles, Treaty of, Article 227, 94
—— ——, Article 281, 21
—— ——, surrender of war criminals, 61
s.s. *Virgilio*, 226 n.
Visurgis, The, and the Siena case, 101, 102
Vita Food Products Inc. v. *Unus Shipping Co., Ltd.*, 19 n., 21 n., 22 n., 211, 212
Vital Interests and the Law, 51–7
Viveash v. *Becker*, 35

Waalhaven, The, 223, 224
War Crimes, the limits of punishment of, 69
—— ——, United Nations Commission for the Investigation of, 60 n.
War Criminals, trial of, safeguards of impartiality, 80
—— ——, surrender from neutral States, 86
Warden v. *Bailey*, 71 n.
Warfare, rules of, whether binding upon individuals, 64, 65
Weiner v. *Central Fund for German Jewry*, 229 n.
Wemberg v. *Hellevig*, 45
Westphal, Albert C. F., *The Home Committee on Foreign Affairs*, 264–5
Water policy, international regulation of, 105
Whales, international protection of, 106
Wigmore, John H., *A Guide to American International Law and Practice*, 265
Williams, Sir J. Fischer, on State Contracts, 11 n., 32
Wimbledon, The, 13
Winfield, P. H., *The Foundations and the Future of International Law*, 265
Wireless apparatus, 104
Wright, Quincy, *A Study of War*, 265–6

Zarine v. *Owners of Ramava*, 102
Zizianoff v. *Kahn and Bigelow*, 41, 45

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